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United States

1067  
Circuit Court of Appeals

For the Ninth Circuit.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Interveners.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Intervener,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, and WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Defendants L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, Interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, the INTERMOUNTAIN ELECTRIC COMPANY, THE THOUSAND SPRINGS POWER COMPANY and the GUARANTY TRUST COMPANY OF NEW YORK, GENERAL CREDITORS OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY,

Appellants,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, and Interveners, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, and Complainant, EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

Appellees.

SUPPLEMENTAL TRANSCRIPT OF RECORD. 1916

Upon Appeals from the United States District Court for the District of Idaho, Southern Division.







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Appellants,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, and Interveners, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, and Complainant, EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

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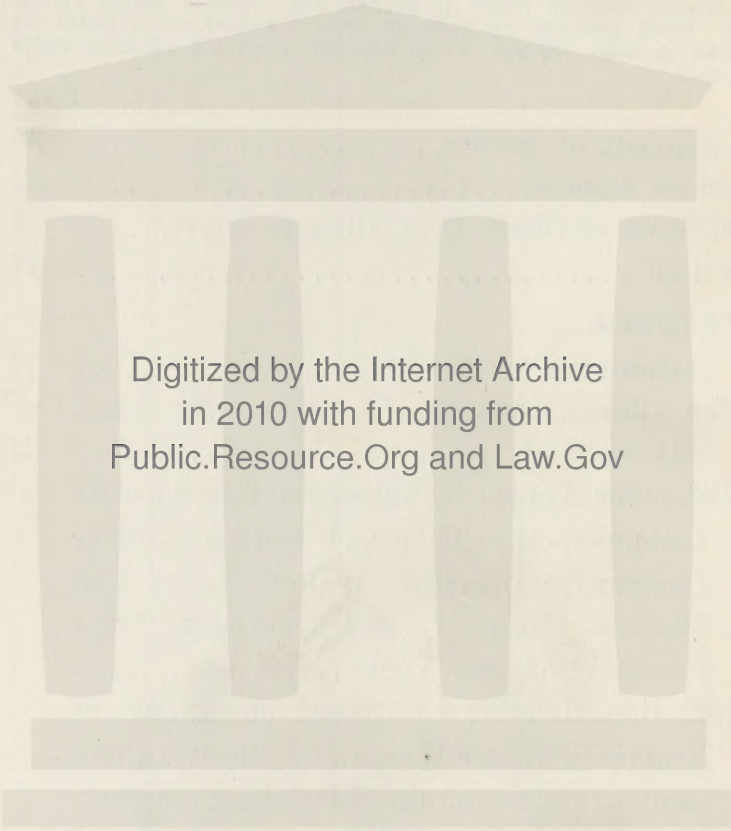
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

THE EQUITABLE TRUST COMPANY OF  
NEW YORK, as Sole Trustee Under a Deed  
of Trust made by THE GREAT SHO-  
SHONE AND TWIN FALLS WATER  
POWER COMPANY, Dated May 1, 1910, and  
Supplemental Mortgages Dated June 21, 1911,  
and April 7, 1913.

Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY, a Corpora-  
tion, WILLIAM T. WALLACE, as Receiver  
of GREAT SHOSHONE AND TWIN  
FALLS WATER POWER COMPANY,  
GUY I. TOWLE, and CARL J. HAHN as  
Administrator of the Estate of HARRY M.  
KING, Deceased,

Defendants,

and

L. M. PLUMER and E. B. SCULL, Executors of  
the Estate of L. L. McCLELLAND, Deceased,  
and JAKE M. SHANK,

Intervenors.

Petition for Appeal by Intermountain Electric  
Company, the Thousand Springs Power Com-  
pany, American Water Works and Electric  
Company, and Guaranty Trust Company of New  
York.

COME NOW the Intermountain Electric Com-



pany, the Thousand Springs Power Company, American Water Works and Electric Company, and Guaranty Trust Company of New York, and, conceiving themselves aggrieved by the decree made and entered in the above-entitled cause on December 6, 1915, and by the order made in said cause pursuant to said decree on March 1, 1916, hereby appeal from said decree and order so made and entered, as aforesaid, to the United States Circuit Court of Appeals for the Ninth Circuit, in so far as said decree and order direct that the fund designated therein as "Unsecured Creditors' Fund" be distributed and paid by the Special Master named in said decree to a certain few unsecured general creditors, viz.: Guy I. Towle, Carl J. Hahn, administrator of the estate of Harry M. King, deceased, Jake M. Shank, and L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, to the exclusion of all other creditors of the defendant Great Shoshone and Twin Falls Water Power Company, for the reasons specified in the assignment of errors which is filed herewith, and your petitioners respectfully petition this Honorable Court to allow said appeal, and your petitioners further show:

1. That on the 2d day of November, 1914, the defendant Guy I. Towle commenced a suit in equity in the nature of a general creditors' suit in the United States District Court for the District of Idaho, Southern Division, against the defendant Great Shoshone and Twin Falls Water Power Company (hereinafter called the "Power Company"),

alleging in his bill of complaint that said Power Company was indebted to him in the sum of \$12,857.29, and in effect that said Power Company was also indebted to a large number of other persons, partnerships and corporations, in an amount far in excess of the reasonable value of its assets, unless properly conserved and that said Power Company was unable to meet its obligations, many of which were past due, and that unless a receiver was appointed and the assets of said corporation were conserved and administered under the direction of the Court such assets would be largely dissipated and wasted and the value thereof greatly depreciated by attachment proceedings and numerous suits instituted by its creditors, and said Towle, plaintiff in said action, prayed that a Receiver be appointed of all the property and assets of said corporation, with power to continue the operation of the properties of said Power Company as a going concern for the benefit of its creditors, and said Towle alleged such other facts and prayed for such other relief as is usual and customary in a bill of complaint in a general creditors' suit against public service corporations.

2. That thereafter and on said 2d day of November, 1914, said Power Company entered its appearance in said cause admitting all the allegations of said bill of complaint and joining in the request for the appointment of a Receiver, and thereupon on said 2d day of November, 1914, the defendant William T. Wallace was duly appointed by said Court Receiver of all the property, real, personal



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and mixed, equities, rights, franchises, and assets of said Power Company, and said Wallace immediately qualified as such Receiver and thereupon took immediate possession, charge and control of all of said property, rights and assets, and ever since has been and still is the Receiver of said Power Company in charge of all its assets, property, rights and franchises, except such as were sold to the Electric Investment Company on the 8th day of January, 1916, and hereinafter more particularly set forth.

3. That in the order appointing said William T. Wallace Receiver of said Power Company, it was ordered, adjudged and decreed that all persons, firms and corporations whatsoever and all creditors of said Power Company be and by said decree were restrained and enjoined from interfering with, attaching, levying upon, seizing or in any manner whatsoever disturbing any of the property, rights or franchises of said Power Company.

4. That thereafter and on May 4th, 1915, said Court entered an order in said cause directing said Receiver to notify all creditors of said Power Company to file their claims with said Receiver on or before August 10th, 1915, and that all claims not presented for filing with the Receiver or presented by intervention within said time, should be barred from any participation in the assets of the receivership estate; that in accordance with said order and a certain supplemental order permitting the petitioner, Guaranty Trust Company of New York, to file its claim on a later date, your petitioners

duly filed their claims with said receiver as follows:

(a) Said American Water Works and Electric Company filed its claim on the 5th day of August, 1915, in the sum of \$1,268, 434.66.

(b) Your petitioner The Thousand Springs Power Company filed its claims on the 9th day of August, 1915, in the aggregate sum of \$10,000.00.

(c) Your petitioner the Intermountain Electric Company filed its claim on the 9th day of August, 1915, in the sum of \$4,717.13.

(d) Your petitioner the Guaranty Trust Company of New York filed its claim on September 23d, 1915 (a supplemental order having been made in its behalf permitting the filing of such claim on said date), in the sum of \$4,427,443.70.

5. That the defendant Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, on May 17th, 1915, filed his claim with said Receiver in the sum of \$5,590.00.

That the intervener Jake M. Shank filed his claim with said Receiver on the 14th day of August, 1915, for the sum of \$4,000.00.

That the interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, filed their claim with said Receiver on August 10th, 1915, in the sum of \$20,000.00; and on the 11th day of August, said L. M. Plumer and E. B. Scull further filed with the clerk of said court what was denominated a petition in intervention in said cause, for the alleged purpose of setting up their claim in said receivership suit by a petition in intervention, to the end that they might be permitted



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to participate in the distribution of the assets of the receivership estate in said cause, but claiming no lien upon any of the assets or right or interest therein other than as general creditors of said Power Company.

6. That all of said claims and a number of claims filed by other creditors, the exact amount thereof being to your petitioners unknown, were filed pursuant to said order of Court and notice of the Receiver requiring the filing of claims against the Power Company for allowance by the Receiver and Court to the end that the same might be entitled to share in the equitable distribution of the assets of said Power Company, pursuant to law and the principles of equity governing the administration and distribution of the assets of insolvent debtors by courts of equity and by Receivers in suits brought by one or more creditors in behalf of themselves and all other creditors of the insolvent debtor.

7. That thereafter and on the 24th day of December, 1915, the Court entered an order in said cause directing that all persons interested therein and desiring to contest the validity or the amount due upon any claim filed with said Receiver, as aforesaid, should on or before the 17th day of January, 1916, file their objections to said claims in said cause, and that a hearing thereon should be had on the 14th day of February, 1916, at 2 o'clock P. M.

8. That on said 14th day of February, 1916, the matter of the allowance of said claims came on for hearing, and no objection having been filed to any of the claims described above, all of said claims were

considered allowed, excepting, however, the following claims which had been presented to the Judge at Chambers and allowed *ex parte* without notice to or knowledge of such hearing by your petitioners: The said L. M. Plumer and E. B. Scull, executors as aforesaid, obtained the allowance of their said claim on the 16th day of October, 1915, in the sum of \$15,625.00, and on the same day the said defendant Guy I. Towle likewise without notice to or knowledge thereof by your petitioners obtained the allowance of his claim at Chambers in the sum of \$13,963.00; and in the same manner the said intervenor Jake M. Shank on the 25th day of October, 1915, obtained the allowance of his claim in the sum of \$4,390.00.

9. That on the 14th day of April, 1915, the complainant Equitable Trust Company of New York commenced in said court a suit against said Power Company and its said Receiver, and the said Carl J. Hahn and the said Guy I. Towle for the foreclosure of a certain mortgage bearing date the 1st day of May, 1910, and certain Supplemental Mortgages dated, respectively, June 21st, 1911, and April 7th, 1913, all executed by the Power Company and purporting to cover all the property, real, personal and mixed, and all assets, rights and franchises of the Power Company, and such proceedings were had therein that said cause was, as your petitioners have since learned, in the forepart of October, 1915, set for trial for October 25th, 1915, and that on the 23d day of October, 1915, as your petitioners have since learned the said interveners

L. M. Plumer and E. B. Scull, executors as aforesaid, and the said Guy I. Towle obtained leave to intervene in said foreclosure suit and filed their complaint in intervention in said cause setting forth that the mortgages so sought to be foreclosed by The Equitable Trust Company of New York had not been executed in accordance with the laws of the State of Idaho relative to mortgages on personal property and that the same did not constitute a lien upon such personal property, but that such property should be sold separately and the proceeds thereof applied to the payment of the claims of said Towle and Plumer and Scull, and thereafter and on the 25th day of October the said Jake M. Shank likewise filed his complaint in intervention in said foreclosure suit in substantially the same form and making substantially the same charges, claims and contentions as the said Towle, Plumer and Scull; that the Court upon said cause being called for trial on the 25th day of October, 1915, directed the Receiver to file its answer in said cause, whereupon said Receiver on the 26th day of October, 1915, filed his answer on said foreclosure suit, setting forth the nature of the property owned by said Power Company and the manner in which some of said property had been acquired, praying, among other things, that only so much thereof be sold as is covered by the liens described in the bill of complaint and that the Receiver be given all proper relief.

10. That thereafter and on December 6th, 1915, the Court entered its decree in said cause adjudg-



ing and decreeing that said mortgages had not been executed in accordance with the statutes of the State of Idaho relative to mortgages on personal property, and ordering and decreeing that the defendants Towle and Hahn, and the interveners, Plumer, Scull and Shank, general creditors of said Power Company who had intervened in said foreclosure suit after obtaining the allowance of their claims in said general creditors' suit, had by virtue thereof obtained a claim or preference over other general creditors and acquired a lien upon such personal property superior to the lien of said mortgages and superior to the rights of said Receiver and other general creditors of the Power Company; and it was ordered and decreed that the proceeds from the sale of said personal property be by the Special Master placed in a fund denominated in said decree the "Unsecured Creditors' Fund," and that said Special Master pay out of such fund the claims of said Towle, Hahn, Plumer, Scull, and Shank in full, and that the balance, if any, out of the proceeds from such personal property be paid to the Equitable Trust Company of New York.

11. That thereafter and on the 8th day of January, 1916, the Special Master, pursuant to the terms of said decree, caused all the property and assets of said Power Company, except cash on hand and certain bills and accounts in the possession of the Receiver, to be sold at public sale, and the same were thereupon bid in and purchased by the Electric Investment Company for the sum of \$2,000,-000.00, which sale was thereafter and on February

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16th, 1916, duly confirmed by the Court, and out of such proceeds of sale the sum of \$45,000.00 was placed in said "Unsecured Creditors' Fund," the same being the amount of the proceeds from the sale of such personal property; and thereafter and on March 1st, 1916, said Court ordered and directed such Special Master to pay in full out of said "Unsecured Creditors' Fund" the claims of the said Towle, Hahn, Plumer, Scull and Shank.

12. That on the 14th day of February, 1916, your petitioner The American Water Works and Electric Company filed its petition for leave to intervene and complaint in intervention in said foreclosure suit on behalf of itself and all other general creditors, seeking thereby to obtain for the benefit of all of said general creditors the said "Unsecured Creditors' Fund," and praying that it might be ordered and decreed that said fund should be paid over by the Special Master to the receiver in said general creditors' suit for distribution in said suit among all the creditors of said Power Company according to their respective rights and interests and alleging and showing that it would be unjust, unconscionable and unfair for said Towle, Hahn, Plumer, Scull and Shank to obtain the payment of their claims in full and to allow none of said proceeds to be paid to the Receiver or to other general creditors. Thereupon the Court denied said application in intervention and declined to modify its said decree relative to the application of the proceeds from such personal property.

13. Thereafter an appeal was perfected by said

Equitable Trust Company of New York from said decree and from said order of March 1st, 1916, and an appeal was also perfected by said American Water Works and Electric Company from said order of March 1st, 1916, and from the order of the Court declining to permit said petitioner to intervene in said foreclosure suit; that said appeals have been assigned for hearing in this court on the 2d day of June, 1916, being Cause No. 2791 now pending in this court, and your petitioners beg leave to refer to the record in said cause for a full and complete statement of the contents of the pleadings, orders, and other documents hereinbefore referred to.

14. That your petitioners believing that said District Court had by its said decree and by its said order of March 1st, 1916, wherein it directed the Special Master to pay the claims of said Towle, Hahn, Plumer, Scull and Shank in full, contrary to law and the principles of equity governing the administration of the assets of insolvent corporations for the equal and *pro rata* benefit of all creditors, permitted certain general creditors to obtain an unconscionable and unfair advantage over other general creditors of said Power Company and that the Court had in effect withdrawn from the receivership estate certain assets of the Power Company and directed that the same be applied to the special benefit of certain creditors, requested the Receiver to perfect an appeal from said decree and from said order of March 1st to the United States Circuit Court of Appeals for the Ninth Cir-



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cuit, and your petitioner the American Water Works and Electric Company further offered to pay all the expenses of said appeal incurred by said Receiver, including counsel fees, in the event such appeal should be fruitless, or in the event the decree and order of said District Court should be affirmed. Said request so signed by your petitioners and addressed to said Receiver being in words and figures following, to wit:

“Salt Lake City, Utah. March 13, 1916.

William T. Wallace, Esq.,

Receiver, Great Shoshone and Twin Falls  
Water Power Co., Boise, Idaho,

Dear Sir:—

The undersigned general creditors of the Great Shoshone and Twin Falls Water Power Company, respectfully request that you perfect an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decision of the Honorable District Court of the United States for the District of Idaho, Southern Division, in the foreclosure suit brought by the Equitable Trust Company of New York, as Trustee, against the Great Shoshone and Twin Falls Water Power Company, William T. Wallace as Receiver of said Company, Guy I. Towle and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, wherein the Court held that you as Receiver were not entitled to contest the validity of the trust deed and the supplemental mortgages sought to be foreclosed in said

cause as liens upon and against the personal property owned by said Great Shoshone and Twin Falls Water Power Company, and wherein the defendants Guy I. Towle and Carl J. Hahn, as administrator, and the interveners L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank were adjudged and decreed to have a lien or claim against such personal property prior and superior to the lien or claim of the Receiver as the representative of all the creditors of said Great Shoshone and Twin Falls Water Power Company.

We make this request for the reason that we understand the funds and assets in your possession available for distribution or payment to the general creditors will be sufficient to pay only a small part of the amount due, and we understand that the amount ordered paid to the defendants and interveners above named, who had also filed their claims in the general creditors suit, aggregates approximately \$45,000.00, and we believe this money should be paid to you as Receiver for distribution and administration in the general creditors' suit.

Respectfully."

15. That after receiving said request said Receiver conferred with its counsel relative to perfecting said appeal and counsel for said Receiver thereupon conferred with the Judge of said court under whose direction the Receiver was acting relative to perfecting an appeal from said decree and order, and the Judge of said court disapproved of such appeal being taken by the Receiver, and your

petitioners in order to bring the matter fully to the attention of the Court filed a petition in said general creditors' suit setting forth more at length the circumstances and the reasons why such appeal should be perfected and requesting the Court to instruct the Receiver to take said appeal, a copy of which said petition is hereto attached, marked Exhibit "A" and made a part hereof, and your petitioners pray that the same may be considered with the same force and effect as if it were herein set forth at large.

That said District Court promptly denied said petition and refused to permit said Receiver to take an appeal from said order and decree.

That your petitioners are now remediless in the premises unless the appeal be allowed by this Honorable Court or one of the Judges thereof. Your petitioners further show that the time for perfecting an appeal from said decree will expire on the 6th day of June, 1916; that an application to permit an appeal to be taken by your petitioners in the place and stead of said Receiver on behalf of themselves and all other creditors of said Power Company would be disallowed by the District Court or the Judge thereof; that said Court is now sitting at Coeur D'Alene in the northern part of the State of Idaho, and that your petitioners would not have time to make application to this Court for the allowance of said appeal or for a review of said order after the same had been presented to and refused by said Court or the Judge thereof.



WHEREFORE, your petitioners pray that this appeal may be allowed from said decree and order, either in the name of the Receiver or in the name of your petitioners, but at the cost and expense of your petitioners who desire to prosecute such appeal by their counsel, and that citation issue as provided by law, and that such supplemental record, if any, as may be necessary in connection with the record in the appeals of said Equitable Trust Company of New York and American Water Works and Electric Company hereinbefore mentioned, Cause No. 2791 of this court, now pending in this court and assigned for hearing on June 2d, 1916, may be prepared and certified to this Court by the clerk of said District Court, and for such other relief as may be meet and proper under the circumstances.

INTERMOUNTAIN ELECTRIC COMPANY.

THE THOUSAND SPRINGS POWER COMPANY,

AMERICAN WATER WORKS AND ELECTRIC COMPANY.

GUARANTY TRUST COMPANY OF NEW YORK.

By WYMAN & WYMAN,  
Their Solicitors.

FRANK T. WYMAN,  
Of Counsel.

United States of America,  
District of California,  
County of San Francisco.

Frank T. Wyman, being first duly sworn, upon his

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oath deposes and says: That he is one of the solicitors for the petitioners above named; that he has read the above and foregoing petition and knows the contents thereof and that he believes the facts therein stated to be true; that he makes this verification for and on behalf of said petitioners for the reason that said petitioners are not residents of the State of Idaho or California, but each and all of said petitioners are foreign corporations having no officers within the States of Idaho or California.

FRANK T. WYMAN.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal]

CHARLES R. HOLTON,  
Notary Public.

Appeal allowed this 2d day of June, 1916.

WM. B. GILBERT,  
Circuit Judge.

It is ordered that the appellants' bond on appeal be given in the sum of five hundred dollars, the same to be approved by the clerk of the Circuit Court of Appeals.

WM. B. GILBERT,  
Circuit Judge.

**Exhibit "A."**

*In the District Court of the United States for the  
District of Idaho, Southern Division.*

IN EQUITY—No. 509.

GUY I. TOWLE,

Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY,

Defendant.

**PETITION.**

COME NOW your petitioners, Guaranty Trust Company of New York, a corporation organized and existing under the laws of New York, American Water Works and Electric Company, a corporation organized and existing under the laws of Virginia, Intermountain Electric Company, a corporation organized and existing under the laws of Utah, and The Thousand Springs Power Company, a corporation organized and existing under the laws of Utah, creditors in the above-entitled cause, whose claims have been duly filed, and respectfully show the Court as follows:

That on the 2d day of November, 1914, Guy I. Towle, plaintiff above named, on behalf of himself and all other creditors of Great Shoshone and Twin Falls Water Power Company, defendant above named and hereinafter called "Power Company," commenced in this court this general creditors' suit



against said Power Company and in his bill of complaint alleged and showed that said Power Company was indebted to him in the sum of \$12,857.29, with interest thereon, and that said Power Company was also indebted to a large number of other persons, partnerships, and corporations in an amount far in excess of the reasonable value of its assets, and that said Power Company was insolvent and unable to meet its obligations and that in order to protect the rights of the creditors of said Power Company and to prevent any of said creditors from obtaining an unfair or unconscionable advantage or preference over other creditors by attachment or otherwise, a Receiver should be appointed of all the property, rights and assets of said corporation to take charge of and preserve the property of said Power Company and continue the operation thereof for the benefit of its creditors, and further alleged such other facts and prayed for such other relief as is usual and customary in a bill of complaint in a general creditors' suit against public service corporations, as more fully appears in the complaint of said Guy I. Towle on file herein.

That thereafter and on the 2d day of November, 1914, said Power Company entered its appearance in this cause by answer, admitting all of the allegations of said bill of complaint and joining in the request for the appointment of a Receiver, and thereupon on said 2d day of November, 1914, William T. Wallace was duly appointed by this Court Receiver of all the property, real, personal and mixed, equities, rights and franchises of said Power Company

and immediately qualified as such Receiver by giving bond and taking the oath required, and thereupon took possession, charge and control of all the property, rights and assets of said Power Company and ever since has been and still is in possession and control thereof and is entitled to the possession and control thereof as Receiver of this court appointed in this cause.

That in said order of November 2d, 1914, appointing said William T. Wallace Receiver of said Power Company, it is ordered, adjudged and decreed that all persons, firms and corporations whatsoever, be and by said decree were restrained and enjoined from interfering with, attaching, levying upon, seizing or in any manner whatsoever disturbing any of the property, rights or franchises of said Power Company.

That thereafter and on the 4th day of May, 1915, this Honorable Court entered an order in said cause directing said Receiver of said Power Company to notify all creditors of said Power Company to file their claims with said Receiver on or before August 10th, 1915, and that all claims not presented for filing with the Receiver or presented by intervention within said time should be barred from any participation in the assets of the receivership estate.

That on the 5th day of August, 1915, your petitioner, American Water Works and Electric Company, filed its claim with said Receiver pursuant to said order of Court and the notice given thereunder by said Receiver showing that said Power Company was indebted to said petitioner in the sum of \$1,268,-

434.66, as more fully appears from the claim of said petitioner on file herein and which sum was and is justly due from said Power Company to your petitioner.

That on August 9th, 1915, your petitioner, The Thousand Springs Power Company, filed its claim with said Receiver pursuant to said order of Court and notice given thereunder by said receiver, showing that said Power Company was indebted to said petitioner in the sum of \$7,000.00, with interest thereon, as more fully appears from the claim of said petitioner on file herein, and which sum is justly due from said Power Company to your petitioner.

That on August 9th, 1915, your petitioner, The Thousand Springs Power Company, filed its claim with said Receiver pursuant to said order of Court and notice given thereunder by said Receiver, showing that said Power Company was indebted to said petitioner in the sum of \$3,000.00, with interest thereon, as more fully appears from the claim of said petitioner on file herein, and which sum is justly due from said Power Company to your petitioner.

That on August 9th, 1915, your petitioner, Inter-mountain Electric Company, filed its claim with said Receiver pursuant to said order of Court and a notice given thereunder by said Receiver, showing that said Power Company was indebted to said petitioner in the sum of \$4717.13, with interest thereon, as appears more fully from the claim of said petitioner on file herein and which sum is justly due from said Power Company to your petitioner.



That on September 23d, 1915, your petitioner, Guaranty Trust Company of New York, filed its claim with said Receiver pursuant to said order of Court and notice given thereunder by said Receiver, showing that said Power Company was indebted to said petitioner in the sum of \$4,427,443.70, with interest thereon, as more fully appears from the claim of said petitioner, on file herein and which sums are justly due from said Power Company to your petitioner.

That on or about the 19th day of May, 1915, Carl J. Hahn, administrator of the estate of Harry M. King, deceased, pursuant to said order of Court and notice given by said Receiver, filed his claim with said Receiver, claiming that said Power Company was indebted to him in the sum of \$5,590.00, together with costs and interest thereon.

That on the 14th day of August, 1915, Jake M. Shank filed with said Receiver his claim against the said Power Company alleging there was due to him about \$4,000.00 from said Power Company, the exact amount being to your petitioner unknown.

That on the 10th day of August, 1915, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, filed their claim with said Receiver in the sum of \$20,000.00, and also filed with the clerk of this court a pleading denominated a cross-bill or complaint generally describing the said claim, and further stating therein that said executors were entitled to participate in the distribution of the assets of said Power Company and to receive their proportionate share thereof to which the

then value of said claim might entitle them; and on the 11th day of August, 1915, said L. M. Plumer and E. B. Scull, executors as aforesaid, further filed with the clerk of said court their petition in intervention in this cause for the alleged purpose of setting up their claim to the end that they might be permitted to participate in the distribution of the assets of the receivership estate in this cause.

That all of said claims and a large number of other claims aggregating upwards of \$4,000,000, the exact amount thereof being to your petitioners unknown, were filed with the Receiver in this cause pursuant to said order of Court and notice of the Receiver requiring the filing of claims against the Power Company for allowance by the Receiver and Court, to the end that the same might be entitled to share in the equitable distribution of the assets of such receivership estate, pursuant to law and the principles of equity governing the administration and distribution of the assets of insolvent debtors by courts of equity in suits brought by one or more creditors in behalf of themselves and all other creditors of the insolvent debtor.

That thereafter and on the 24th day of December, 1915, this Honorable Court made and entered an order in this cause that all persons interested therein desiring to contest the validity of the amount due upon any claim filed with the Receiver as aforesaid should on or before the 17th day of January, 1916, file in this cause their objections thereto and that a hearing therein should be had on the 14th day of February, 1916, at 2 o'clock P. M.

That on the 14th day of April, 1915, the Equitable Trust Company of New York as sole trustee under a Deed of Trust dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, made by said Power Company, commenced in this court a suit against said Power Company, and the said William T. Wallace as Receiver thereof, and the said Guy I. Towle, and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, being Equity Cause No. 526, and thereafter on September 16th, 1915, filed its supplemental Bill of Complaint therein, for the foreclosure of said Deed of Trust and Supplemental Mortgages given by said Power Company, and purporting to be a first and prior *line* upon all the property, rights, and assets of said Power Company and on the earnings and income thereof; and which said Deed of Trust and Supplemental Mortgages were given to secure the payment of certain first mortgage bonds of said Power Company alleged to be outstanding and unpaid in the principal amount of \$2,230,000.00; and that thereafter on October 27th, 1915, said Power Company as defendant in said Equity Cause No. 526 filed its answer therein, admitting each and every allegation in said bill of complaint and said supplemental bill of complaint as therein set forth and alleged.

That on October 26th, 1915, said Receiver, William T. Wallace, filed his answer as defendant in said Equity Cause No. 526 and prayed that this Court first ascertain the amount actually due from said Power Company and that only so much of the property of said Power Company be sold as is covered by



the lien described in said bill of complaint of said The Equitable Trust Company of New York and that said Receiver be given all proper relief.

That L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Carl J. Hahn, administrator of the estate of Harry M. King, deceased, said Guy I. Towle and Jake M. Shank, general creditors, whose claims have been filed in this cause as aforesaid, having acquired certain information relative to said property of said Power Company upon which a lien or preference might be acquired superior to the lien of the Deed of Trust and supplemental mortgages as aforesaid which The Equitable Trust Company of New York sought to foreclose, by complaint in intervention or answer in said Equity Cause No. 526 in this court, alleged and showed that because said Deed of Trust and Supplemental Mortgages had not been executed or filed as required by the laws of the State of Idaho relative to chattel mortgages, the same did not constitute a lien or claim upon the personal property of said Power Company but that the said interveners and defendants, to wit, the said Guy I. Towle, Carl J. Hahn, administrator as aforesaid, Jake M. Shank, L. M. Plumer and E. B. Scull, executors as aforesaid, as general creditors of said Power Company, had a superior lien or claim upon said personal property, and such proceedings were had upon said complaints in intervention and answers so filed that it was adjudged and decreed upon the issues so raised in said Equity Cause No. 526 in said court, that the said Deed of Trust and Supplemental Mortgages so

sought to be foreclosed by said The Equitable Trust Company of New York had not been executed or filed in accordance with the chattel mortgage statutes of the State of Idaho, and that the claim of said creditors as against said personal property of said Power Company was prior and superior to the lien of said Deed of Trust and mortgages, and it was adjudged and decreed in the decree of foreclosure made and entered by this Court in said Equity Cause No. 526, on December 6th, 1915, that the proceeds from the sale of such property should be placed by the Special Master appointed by this Court in said cause for conducting such sale in a fund known and designated in said decree as the "Unsecured Creditors' Fund," and that out of such fund said Special Master should pay the said Guy I. Towle \$13,963.01, to the said Carl J. Hahn, administrator as aforesaid, \$6,225.15, to the said L. M. Plumer and E. B. Scull, executors as aforesaid, \$15,625.00, and to the said Jake M. Shank, \$4,390.00, with interest at 7% from the date of said decree, viz.: December 6th, 1915.

That such personal property has been sold by said Special Master, together with the other property of said Power Company, and the amount realized therefrom was the sum of \$45,000.00, which is the amount to be placed in said "Unsecured Creditors' Fund" to be paid out and distributed as provided in said decree and as above set forth, and the said sum of \$45,000.00 is the full amount realized from the sale of the property and assets of said Power Company upon which the said Deed of Trust and Supplemental Mortgages so sought to be foreclosed were not decreed a first and

prior lien, being the amount realized from the property and assets of the Power Company available for the payment of the claims of other creditors than the said complainant The Equitable Trust Company of New York; that in addition to said sum of \$45,000.00, your petitioners are informed and believe that there is approximately \$25,000.00 in the hands of the Receiver of said Power Company that may also be available for the payment of claims of said general creditors in this cause, making in the aggregate approximately \$70,000.00 available for the payment of claims aggregating upwards of \$4,000,000.00; that the other property of said Power Company, subject to the prior lien of said Deed of Trust and Supplemental Mortgages was sold for \$2,000,000.00 by said Special Master of this Court under the decree of foreclosure made and entered by this Court on December 6th, 1915, in said Equity Cause No. 526, which amount was less, as your petitioners are informed and believe, than is due the said plaintiff under said decree of foreclosure.

That on the 1st day of March, 1916, this Court in said Equity Cause No. 526 made and entered an order directing said Special Master appointed in said cause to disburse and pay out to said claimants in said cause the amounts found due to them, as aforesaid, by said decree, made and entered in said cause on December 6th, 1915, as aforesaid.

That the general creditors of said Power Company will suffer a large loss in that the assets available for the payment of their claims amount to only about two per cent of the face of said claims; that any payments



made to the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, administrator as aforesaid, and L. M. Plumer and E. B. Scull, executors as aforesaid, in excess of their *pro rata* and proportionate part of the assets available for the claims of general creditors based upon the aggregate amount of the claims of the said general creditors allowed and approved by this Honorable Court will in effect be a payment by the other general creditors to the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, L. M. Plumer and E. B. Scull, and reduce accordingly the amount that can be received by or paid to other general creditors.

That the provisions of said decree of December 6th, 1915, giving to the said Guy I. Towle, Jake M. Shank, Carl J. Hahn, L. M. Plumer and E. B. Scull any preference or priority whatsoever over other general creditors of said Power Company or directing said Special Master to make any payments whatsoever to them, are unfair and unjust to your petitioners and other general creditors of said Power Company and that the said claimants who were by said decree allowed a preference as aforesaid over other general creditors had invoked the aid and jurisdiction of this court in said general creditors' suit and sought and obtained the benefit of such suit and by their acts and conduct in said cause acquiesced in and consented to the administration of the affairs of said Power Company for the benefit of all creditors and on the plan of the equitable and *pro rata* distribution to all creditors of all the available assets of said Power Company.

That the Honorable Court in said decree of December 6th, 1915, made and entered in said Equity Cause No. 526, and in its said order of March 1st, 1916, in said cause, directed said Special Master appointed in said cause, to pay to said Guy I. Towle, Jake M. Shank, Carl J. Hahn, and L. M. Plumer and E. B. Scull the full amount due them from the Power Company to the exclusion of your petitioners and all other creditors of said Power Company and granted preference and priority to the said creditors Guy I. Towle, Jake M. Shank, Carl J. Hahn, and L. M. Plumer and E. B. Scull over all of the general creditors of said Power Company represented in said Cause No. 526 by said Receiver and denied the said Receiver the relief prayed for in his answer as aforesaid, and to which he was entitled as the receiver of all the property and assets of said Power Company, and that by said decree and order this Court transferred, took and removed from the receivership estate aforesaid certain assets of said Power Company in which all of the creditors of said Power Company had an interest and applied and devoted the same to the payment in full of the claims of certain of said creditors of said Power Company to the exclusion of your petitioners and all other creditors of the Power Company as aforesaid.

That your petitioners are not parties to said Equity Cause No. 526 in this court except as represented therein by said Receiver, and unless said Receiver as such representative in said Equity Cause No. 526 of your petitioners and of all the creditors of said Power Company, is permitted and directed to perfect

an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decision, decree and order, as aforesaid, of this Honorable Court in said Equity Cause No. 526 for and on behalf of all the creditors of said Power Company, your petitioners will be without relief and said assets taken and removed from said receivership estate, as aforesaid, will not be available for administration and equitable distribution to all the creditors of said Power Company in this cause.

WHEREFORE, Your petitioners pray for an order of this Honorable Court directing the said William T. Wallace, Receiver as aforesaid, to perfect an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said decision and decree made and entered by this Court in said Equity Cause No. 526 on December 6th, 1915, and from said order made and entered by this court on March 1st, 1916, in said Equity Cause No. 526, directing said Special Master to disburse moneys in accordance with said decree, for and on behalf of your petitioners and all other general creditors whose claims have been filed in this cause, on such terms and conditions as the Court may deem proper and your petitioners pray for such further relief as may be meet and proper under the circumstances.

Dated this 6 day of April, 1916.

GUARANTY TRUST COMPANY OF  
NEW YORK, TRUSTEE,

By WYMAN & WYMAN,

Its Solicitors.

AMERICAN WATER WORKS AND  
ELECTRIC COMPANY.

By WYMAN & WYMAN,

Its Solicitors.

INTERMOUNTAIN ELECTRIC COM-  
PANY,

By PARSONS & PARSONS,

Its Solicitors.

THE THOUSAND SPRINGS POWER  
COMPANY,

By PARSONS & PARSONS,

Its Solicitors.

[Endorsed]: No. 2791. United States Circuit Court of Appeals for the Ninth Circuit. The Equitable Trust Company of New York, Plaintiff, vs. Great Shoshone and Twin Falls Water Power Company, a Corporation et al., Defendants, and L. M. Plumer et al., Interveners. Petition for Appeal by Intermountain Electric Company, The Thousand Springs Power Company, American Water Works and Electric Company, and Guaranty Trust Company of New York. Filed Jun. 2, 1916. F. D. Monckton, Clerk.



At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday, the second day of June, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2791.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, THE INTERMOUNTAIN ELECTRIC COMPANY, THE THOUSAND SPRINGS POWER COMPANY and THE GUARANTY TRUST COMPANY OF NEW YORK, General Creditors of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY,

Appellants,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER

COMPANY, and Interveners, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, and Complainant, **EQUITABLE TRUST COMPANY OF NEW YORK**, as Sole Trustee Under a Deed of Trust Made by **GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY**, Dated May 1, 1910, and Supplemental Mortgages Dated June 21st, 1911, and April 7th, 1913,

Appellees.

**Order Allowing Appeal of Intermountain Electric Co. et al.**

Upon oral motion of Mr. Frank T. Wyman, counsel for the appellants in the above-entitled cause, and on consideration of the petition therefor, this day filed, it is **ORDERED** that the appeal of the above-entitled appellants in said cause be, and the same is hereby allowed.

**IT IS FURTHER ORDERED** that the said papers on appeal, together with such certified Transcript of Record as may be presented, shall be filed as a Supplemental Transcript of Record in case No. 2791, **The Equitable Trust Company of New York**, as Sole Trustee, etc., vs. **Great Shoshone and Twin Falls Water Power Company**, a Corporation, et al., etc., and that the said appeal shall stand submitted on the oral argument made, and briefs on file in said case No. 2791.

*United States Circuit Court of Appeals for the Ninth  
Circuit.*

THE EQUITABLE TRUST COMPANY OF NEW  
YORK, as Sole Trustee Under a Deed of  
Trust Made by THE GREAT SHOSHONE  
AND TWIN FALLS WATER POWER  
COMPANY, Dated May 1, 1910, and Supple-  
mental Mortgages Dated June 21, 1911, and  
April 7, 1913,

Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY, a Corpora-  
tion, WILLIAM T. WALLACE, as Receiver  
of GREAT SHOSHONE AND TWIN  
FALLS WATER POWER COMPANY,  
GUY I. TOWLE, and CARL J. HAHN as  
Administrator of the Estate of HARRY M.  
KING, Deceased,

Defendants.

And

L. M. PLUMER and E. B. SCULL, Executors of the  
Estate of L. L. McCLELLAND, Deceased,  
and JAKE M. SHANK,

Intervenors.

**Assignment of Errors.**

COME NOW the American Water Works and  
Electric Company, Intermountain Electric Com-  
pany, The Thousand Springs Power Company, and

Guaranty Trust Company of New York, and, having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above-entitled cause on the 6th day of December, 1915, by the District Court of the United States for the District of Idaho, Southern Division, and from an order made and entered in said cause on the 1st day of March, 1916, authorizing and directing the Special Master appointed in said decree to pay in full out of the "Unsecured Creditors' Fund" mentioned in said decree the claims against the defendant Great Shoshone and Twin Falls Water Power Company held by the following creditors, to wit: Guy I. Towle, in the sum of \$13,963.01; Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, in the sum of \$6,225.15; L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, in the sum of \$15,625.00; and Jake M. Shank, in the sum of \$4,390.00, say that said decree and said order made and entered as aforesaid and the decision of the United States District Court for the District of Idaho, Southern Division, in said cause, are erroneous and unjust to these petitioners and appellants, and particularly in this:

(1) Because the Court erred in holding, adjudging and decreeing in its said decree that the "Unsecured Creditors' Fund" in said decree mentioned should be paid to the said Guy I. Towle, Carl J. Hahn, L. M. Plumer and E. B. Scull, and Jake M. Shank, in the respective amounts set forth in said decree, and that the balance, if any, of said fund should then



be paid to the plaintiff, The Equitable Trust Company of New York; and in thereafter ordering the payment and distribution of said "Unsecured Creditors' Fund" to the above-named parties.

(2) Because the Court erred in not holding and decreeing that such "Unsecured Creditors' Fund" should be paid to the Receiver of the said Great Shoshone and Twin Falls Water Power Company, appointed in Equity Cause No. 509, wherein the said Guy I. Towle is plaintiff and the said Great Shoshone and Twin Falls Water Power Company is defendant, for distribution and payment in said cause according to the principles of equity and the respective rights of the creditors of said Great Shoshone and Twin Falls Water Power Company.

(3) Because the Court erred in not entering a decree in favor of the defendant William T. Wallace, as Receiver of the Great Shoshone and Twin Falls Water Power Company, as to all personal property of said defendant Power Company upon which the lien of the mortgages of said The Equitable Trust Company of New York was defective or ineffectual, because said mortgages had not been executed and filed as required by the laws of the State of Idaho relative to mortgages on personal property.

WHEREFORE, These petitioners and appellants pray that said decree and said order of March 1, 1916, be annulled and set aside, insofar as the same direct the payment of said "Unsecured Creditors' Fund" to the said Guy I. Towle, Carl J. Hahn, L. M. Plumer and E. B. Scull, and Jake M. Shank, and that the same may be modified so as to provide that such

“Unsecured Creditors’ Fund” shall be paid to the defendant William T. Wallace, as Receiver of said Power Company, for distribution among all the creditors of said Power Company in said general creditors’ suit, wherein said Guy I. Towle is plaintiff and the said Great Shoshone and Twin Falls Water Power Company is defendant.

WYMAN & WYMAN,

Solicitors for American Water Works & Electric Company, Intermountain Electric Company, The Thousand Springs Power Co., and Guaranty Trust Co. of New York.

FRANK T. WYMAN,

Of Counsel.

[Endorsed]: No. 2791. United States Circuit Court of Appeals for the Ninth Circuit. The Equitable Trust Company of New York et al., Plaintiff, vs. Great Shoshone and Twin Falls Water Power Company et al., Defendants, and L. M. Plumer et al., Interveners. Assignment of Errors. Filed Jun. 2, 1916. F. D. Monekton, Clerk.

*United States Circuit Court of Appeals for the  
Ninth Circuit.*

THE EQUITABLE TRUST COMPANY OF  
NEW YORK, as Sole Trustee Under a Deed  
of Trust made by THE GREAT SHOSHONE  
AND TWIN FALLS WATER POWER  
COMPANY, Dated May 1, 1910, and Supple-  
mental Mortgages Dated June 21, 1911, and  
April 7, 1913,

Plaintiff,

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY, a Corpora-  
tion, WILLIAM T. WALLACE, as Receiver  
of GREAT SHOSHONE AND TWIN  
FALLS WATER POWER COMPANY,  
GUY I. TOWLE, and CARL J. HAHN, as  
Administrator of the Estate of HARRY M.  
KING, Deceased,

Defendants,

and

L. M. PLUMER and E. B. SCULL, Executors of the  
Estate of L. L. McCLELLAND, Deceased,  
and JAKE M. SHANK,

Interveners.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
That we American Water Works and Electric Com-  
pany, a corporation organized under the laws of  
the State of Virginia, Intermountain Electric Com-

pany, a corporation, the Thousand Springs Power Co., a corporation and Guaranty Trust Co. of New York, a corporation organized under the laws of the State of New York, as principals, and the American Surety Company of New York, a corporation organized under the laws of the State of New York, as Surety, are held and firmly bound unto the defendant, Guy I. Towle, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, Great Shoshone and Twin Falls Water Power Company, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, Equitable Trust Company of New York and L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased and Jake M. Shank, as their respective interests may appear under the decree entered in said cause on the 6th day of December, 1915 and under the order made and entered therein on the first day of March, 1916, in the penal sum of FIVE HUNDRED (\$500.00) DOLLARS, to be paid to the said parties as their respective interests may appear and to their and each of their executors, administrators, successors or assigns not exceeding, however, in the aggregate the said sum of Five Hundred (\$500.00) Dollars to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

SEALED with our seals and dated this third day of June, A. D. one thousand nine hundred and sixteen.



THE CONDITION of this obligation is such that: Whereas the above-named American Water Works and Electric Company, Intermountain Electric Company, The Thousand Springs Power Company and Guaranty Trust Co. of New York have presecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the place and stead of the said William T. Wallace as Receiver of said Great Shoshone and Twin Falls Water Power Company, from a decree made and entered in said cause on the sixth day of December, 1915, and from a certain order made in said cause on the first day of March, 1916, by the United States District Court for the District of Idaho, Southern Division;

NOW, THEREFORE, if the above-named principals, American Water Works and Electric Company, Intermountain Electric Company, The Thousand Springs Power Co. and Guaranty Trust Co. of New York shall prosecute their said appeal to effect and, if they fail to make their said appeal good, shall answer all costs, then the above obligation to be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF the said principals have caused their respective names to be hereunto subscribed by their duly authorized solicitors and the said surety has caused its name to be hereunto subscribed by its duly authorized officers and its corpor-

40     *The Equitable Trust Co. of New York vs.*

ate seal affixed the date and year first above written.

AMERICAN WATER WORKS AND  
ELECTRIC COMPANY,

By WYMAN & WYMAN,

Its Solicitors.

INTERMOUNTAIN ELECTRIC COM-  
PANY.

By WYMAN & WYMAN,

Its Solicitors.

THE THOUSAND SPRINGS POWER  
COMPANY,

By WYMAN & WYMAN,

Its Solicitors.

GUARANTY TRUST COMPANY OF  
NEW YORK,

By WYMAN & WYMAN,

Its Solicitors.

AMERICAN SURETY COMPANY OF  
NEW YORK.

H. J. DOUGLA,

Resident Vice-President.

[Seal]

Attest: F. E. BRISBINE,

Resident Assitant Secretary.

[Endorsed]: No. 2791. United States Circuit Court of Appeals for the Ninth Circuit. The Equitable Trust Company of New York, as Sole Trustee under a Deed of Trust made by The Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, Plaintiff, vs. Great Shoshone and Twin Falls Water Power Company, a Corpora-

tion, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, Guy I. Towle, and Carl J. Hahn as Administrator of the Estate of Harry M. King, Deceased, Defendants, and A. M. Plumer and E. B. Scull, Executors of the Estate of L. L. McClelland, Deceased, and Jake M. Shank, Interveners. Bond on Appeal. Approved this third day of June A. D. 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

Filed Jun. 3, 1916. F. D. Monckton, Clerk.

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*United States Circuit Court of Appeals for the Ninth Circuit.*

CAUSE No. 2791.

THE EQUITABLE TRUST COMPANY OF NEW  
YORK, as Sole Trustee, etc.,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY, et al.,

Appellees.

AMERICAN WATER WORKS AND ELECTRIC  
COMPANY, a Corporation, Intervener,

Appellant,

vs.

GUY I. TOWLE, et al.,

Appellees.

AMERICAN WATER WORKS AND ELECTRIC  
COMPANY, et al.,

Appellants,

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER COMPANY, et al.,

Appellees.

**Stipulation Relative to Record on Appeal of Amer-  
ican Water Works and Electric Company,  
Intermountain Electric Company, Thousand  
Springs Power Company, and Guaranty Trust  
Company of New York.**

IT IS HEREBY STIPULATED AND  
AGREED, between the solicitors for the respective  
parties above named, that the appeal allowed the  
American Water Works and Electric Company,  
Intermountain Electric Company, Thousand Springs  
Power Company, and Guaranty Trust Com-  
pany of New York, by the United States Circuit  
Court of Appeals for the Ninth Circuit on the  
2d day of June, 1916, may be considered and deter-  
mined upon the printed transcript of the record here-  
tofore filed in Cause No. 2791 pending in this court,  
wherein the Equitable Trust Company of New York  
and American Water Works and Electric Company  
are appellants and the Great Shoshone and Twin  
Falls Water Power Company et al. are appellees, in  
so far as such record may be pertinent to the ques-  
tions arising on said appeal, and upon the papers  
filed in this court in connection with the perfect-  
ing of said appeal, to wit:



- (a) Petition for Appeal.
- (b) Assignment of Errors.
- (c) Order Allowing Appeal.
- (d) Bond on Appeal.
- (e) Citation.
- (f) This Stipulation.

Which last mentioned papers (a to f, inclusive) are to be printed under the supervision of the clerk of the Circuit Court of Appeals at the cost and expense of said appellants, and thereupon the cause including this appeal, shall be submitted to the Court for decision upon the arguments heretofore made and briefs filed in said cause No. 2791.

Dated this 20th day of June, 1916.

P. B. CARTER,

Solicitors for Great Shoshone and Twin Falls Water  
Power Company.

S. H. HAYS,

Solicitor for William T. Wallace, Receiver of Great  
Shoshone and Twin Falls Water Power Com-  
pany.

KARL PAINE,

Solicitor for Guy I. Towle.

J. H. WISE,

By MARTIN & CAMERON,

Solicitor for Carl J. Hahn.

MARTIN & CAMERON,

Solicitor for L. M. Plumer and E. B. Scull, Execu-  
tors of the Estate of L. L. McClelland, Deceased.

ALFRED A. FRASER,

Solicitor for Jake M. Shank.

RICHARDS & HAGA,

J. L. EBERLE,

Solicitors for The Equitable Trust Company of New  
York.

WYMAN & WYMAN,

Solicitors for American Water Works and Electric  
Company, Intermountain Electric Company,  
The Thousand Springs Power Company, and  
Guaranty Trust Company of New York.

[Endorsed]: No. 2791. United States Circuit  
Court of Appeals for the Ninth Circuit. The  
Equitable Trust Company of New York, as Sole  
Trustee, etc., Appellant, vs. Great Shoshone and  
Twin Falls Water Power Company et al., Appellees,  
American Water Works and Electric Company, a  
Corporation, Intervener, Appellant, vs. Guy I.  
Towle et al., Appellees, American Water Works and  
Electric Company et al., Appellants, vs. Great Sho-  
shone and Twin Falls Water Company et al., Appel-  
lees. Cause No. 2791. Stipulation Relative to Rec-  
ord on Appeal of American Water Works and  
Electric Company, Intermountain Electric Company,  
Thousand Springs Power Company, and Guaranty  
Trust Company of New York. Filed Jun. 26, 1916.  
F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

CAUSE No. 2791.

THE EQUITABLE TRUST COMPANY OF NEW  
YORK, as Sole Trustee, etc.,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY et al.,

Appellees.

AMERICAN WATER WORKS AND ELECTRIC  
COMPANY, a Corporation, Intervener,

Appellant,

vs.

GUY I. TOWLE et al.,

Appellees,

AMERICAN WATER WORKS AND ELECTRIC  
COMPANY et al.,

Appellants.

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY et al.,

Appellees.

**Certificate of Clerk, U. S. District Court.**

I, W. D. McReynolds, Clerk of the District Court  
of the United States for the District of Idaho, do  
hereby certify that there are filed in the general  
creditors' suit wherein Guy I. Towle is plaintiff and  
the Great Shoshone and Twin Falls Water Power

Company is defendant, being Equity Cause No. 509, pending in the District Court of the United States for the District of Idaho, Southern Division, the following claims, to wit:

The claim of the Intermountain Electric Company filed on August 9th, 1915, in the sum of \$4,717.13;

The claim of The Thousand Springs Power Company filed on August 9th, 1915, in the sum of \$7,000.00;

The claim of the American Water Works and Electric Company filed on August 5th, 1915, in the sum of \$1,268,434.66;

The claim of the Guaranty Trust Company of New York filed on September 23d, 1915, within the time allowed by order of court dated September 15th, 1915, in the sum of \$4,427,443.70.

AND I FURTHER CERTIFY that no objection has been filed to the claims aforesaid, or any of them, in the District Court of the United States for the District of Idaho.

[Seal]

W. D. McREYNOLDS,  
Clerk.

Dated June 22, 1916.

[Ten Cent Internal Documentary Stamp. Canceled 6/22/16. W. D. M.]



[Endorsed]: No. 2791. In the United States Circuit Court of Appeals for the Ninth Circuit. The Equitable Trust Company of New York, as Sole Trustee, etc., Appellant, vs. Great Shoshone and Twin Falls Water Power Company et al., Appellees, American Water Works and Electric Company, a Corporation, Intervener, Appellant, vs. Guy I. Towle et al., Appellees, American Water Works and Electric Company et al., Appellants, vs. Great Shoshone and Twin Falls Water Company et al., Appellees. Cause No. 2791. Certificate. Filed Jun. 26, 1916. F. D. Monckton, Clerk.

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**Citation.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Defendants, Guy I. Towle, Carl J. Hahn, as Administrator of the Estate of Harry M. King, Deceased, Great Shoshone and Twin Falls Water Power Company, a Corporation, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, and to the Interveners, L. M. Plumer and E. B. Scull, Executors of the Estate of L. L. McClelland, Deceased, and Jake M. Shank, and to the Complainant, Equitable Trust Company of New York, as sole Trustee Under a Deed of Trust Made by Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and Supplemental Mortgages Dated June 21st, 1911, and April 7th, 1913.

You are hereby cited and admonished to be and

appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, of record in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein and whereby the American Water Works and Electric Company, the Intermountain Electric Company, the Thousand Springs Power Company and the Guaranty Trust Company of New York, general creditors of the said Great Shoshone and Twin Falls Water Power Company, were allowed an appeal in the place and stead of the said William T. Wallace as Receiver of the said Great Shoshone and Twin Falls Water Power Company in a suit wherein the Equitable Trust Company of New York as Trustee, is complainant, and the said Great Shoshone and Twin Falls Water Power Company, William T. Wallace, as receiver of said Great Shoshone and Twin Falls Water Power Company, Guy I. Towle, and Carl J. Hahn, as administrator of the Estate of Harry M. King, deceased, are defendants, and L. M. Plumer and E. B. Scull, executors of the Estate of L. L. McClelland, deceased, and Jake M. Shank, are interveners, being cause number 2791, now pending in said Circuit Court of Appeals, to show cause, if any there be, why the orders and decree in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT,

United States Circuit Judge for the Ninth Circuit,  
this 5th day of June, A. D. 1916.

WM. H. HUNT,  
United States Circuit Judge.

Attest: F. D. MONCKTON,  
Clerk, United States Circuit Court of Appeals, Ninth  
Circuit.

Service of the foregoing citation and receipt of  
copy thereof, admitted this 12th day of June, 1916.

RICHARDS & HAGA and  
J. L. EBERLE,

Solicitors for Complainant, Equitable Trust Com-  
pany of New York, Trustee.

P. B. CARTER,  
Solicitor for Great Shoshone and Twin Falls Water  
Power Company.

KARL PAINE,  
Solicitor for Guy I. Towle, Defendant.

J. H. WISE.

By MARTIN & CARMERON,  
Solicitor for Carl J. Hahn, as Administrator of the  
Estate of Harry M. King, Deceased, Defendant.

MARTIN & CAMERON,  
Solicitor for L. M. Plumer and E. B. Scull, Executors  
of the Estate of L. L. McClelland, Deceased,  
Interveners.

ALFRED A. FRASER,  
Solicitor for Jake M. Shank, Intervener.

G. H. HAYS,  
Solicitor for William T. Wallace, Receiver of Great  
Shoshone and Twin Falls Water Power Com-  
pany.

[Endorsed]: No. 2791. United States Circuit Court of Appeals for the Ninth Circuit. The Equitable Trust Company of New York, Appellant, vs. Great Shoshone and Twin Falls Water Power Company, a Corporation, et al., Appellees. Citation. Filed Jul. 1, 1916. F. D. Monckton, Clerk.

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[Endorsed]: No. 2791. United States Circuit Court of Appeals for the Ninth Circuit. The Equitable Trust Company of New York, as sole Trustee Under a Deed of Trust Made by the Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913, vs. Great Shoshone and Twin Falls Water Power Company, a Corporation, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, Guy I. Towle and Carl J. Hahn, as Administrator of the Estate of Harry M. King, Deceased, Defendants and L. M. Plumer and E. B. Scull, Executors of the Estate of L. L. McClelland, Deceased, Jake M. Shank, and American Water Works and Electric Company, a Corporation, Interveners; American Water Works and Electric Company, a Corporation, Intervener, vs. Guy I. Towle, Carl J. Hahn, as Administrator of the Estate of Harry M. King, Deceased, Great Shoshone and Twin Falls Water Power Company, a Corporation and William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants; L. M. Plumer and E. B. Scull, Executors of the Estate of L. L. McClelland, Deceased,



and Jake M. Shank, Interveners, and the Equitable Trust Company of New York, as Sole Trustee Under a Deed of Trust Made by the Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913; American Water Works and Electric Company, the Intermountain Electric Company, The Thousand Springs Power Company and the Guaranty Trust Company of New York, General Creditors of Great Shoshone and Twin Falls Water Power Company, Appellants, vs. Guy I. Towle, Carl J. Hahn, as Administrator of the Estate of Harry M. King, Deceased, Great Shoshone and Twin Falls Water Power Company, a Corporation, William T. Wallace, as Receiver of Great Shoshone and Twin Falls Water Power Company, and Interveners L. M. Plumer and E. B. Scull, Executors of the Estate of L. L. McClelland, Deceased, and Jake M. Shank, and Complainant, Equitable Trust Company of New York, as Sole Trustee Under a Deed of Trust Made by Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and supplemental Mortgages Dated June 21, 1911, and April 7, 1913, Appellees. Supplemental Transcript of Record. Upon Appeals from the United States District Court for the District of Idaho, Southern Division.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,  
Appellees.

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellees.

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**Brief of Appellant,**  
**American Water Works and Electric Company**

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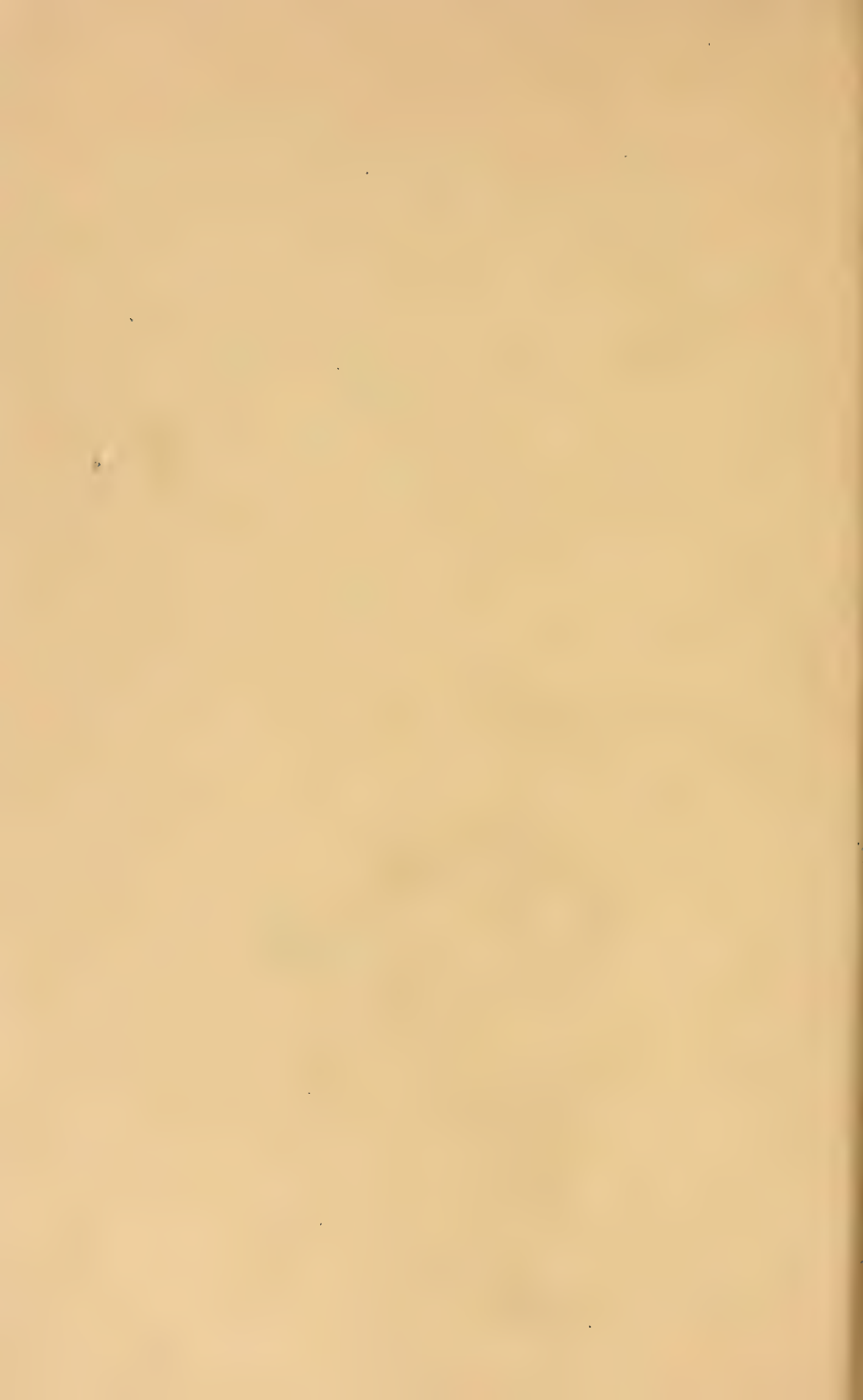
*Upon Appeal From the United States District Court for the District of Idaho, Southern District.*

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WYMAN & WYMAN,  
Residence: Boise, Idaho,  
*Solicitors for American Water Works and Electric Company.*

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,  
Appellees.

---

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, Intervener,  
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellees.

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**Brief of Appellant,**  
**American Water Works and Electric Company**

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*Upon Appeal From the United States District Court for the  
District of Idaho, Southern District.*

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**STATEMENT OF THE CASE.**

This is an appeal from certain orders made and entered by the District Court for the District of Idaho on February 14th, and March 1, 1916, denying appellant, the American

Water Works and Electric Company, leave to intervene and share equitably and ratably in a certain fund then and now in the exclusive possession of that Court known as the "Unsecured Creditors' Fund," and also from that certain order of March 1, 1916, directing the distribution of that fund to certain general creditors to the exclusion of the appellant and all other creditors.

On November 2, 1914, the Great Shoshone and Twin Falls Water Power Company was, and for some years prior thereto had been, engaged in the business of generating and supplying electrical energy for all purposes in Southern Idaho. It was at that time heavily indebted to both secured and unsecured creditors. The secured debt in the main consisted of an issue of bonds secured by a deed of trust and supplemental mortgages purporting to cover all properties of the company owned at the time of the execution of the deed and mortgages and all that it might thereafter acquire.

On that day, Guy I. Towle, a general creditor of the power company, filed in the District Court for the District of Idaho his bill of complaint on behalf of himself and all other creditors, setting forth, in addition to the necessary jurisdictional averments and the nature of his own claim that the defendant was heavily indebted to both secured and unsecured creditors; that these debts were due and the defendant was unable to pay them, and that unless a court of equity interposed and, through a receiver, took charge of and preserved the estate and marshaled the assets of the power company for the benefit and protection of those interested therein, there was great danger that the public interest would be prejudiced through the consequent suspension of defendant's business and interruption in elec-

trical service, and irreparable injury, damage and loss would result to its creditors; and complainant prayed the Court that his rights and those of all other creditors of the power company might be ascertained and decreed; that the Court administer and marshal all of the assets of the power company and ascertain and enforce their respective liens, equities, rights and priority thereto; and that all creditors and other persons be enjoined from instituting or prosecuting suits against the defendant and from levying any attachments, executions or other process upon or against any of its properties (tr. pp. 159 to 170). It will be observed the bill does not allege the insolvency of the defendant. On the contrary, it specifically states that its property, properly conserved and operated, is greatly in excess of its liabilities. Such was the current belief at the time; but the fact is that the power company was wholly insolvent and, despite the proper conservation and operation of its property so prayed for, its general creditors, except certain favored intervenors, will under the order of Court appealed from receive something like two per cent upon their claims. The intervenors and defendants referred to are to be paid in full.

On the same day as the filing of the bill, the power company answered admitting each allegation and joining in the prayer of said bill (tr. pp. 173-174); and thereupon the Court made and entered an order appointing a receiver of all the property real, personal and mixed, equities, rights and franchises of the power company and forbidding the attaching, levying upon, or seizing of the same (tr. pp. 171-173). The receiver immediately qualified and took possession of all of its property and assets.

On May 4, 1915, the Court directed the receiver to give

the notice usual in such cases requiring all creditors of the power company to file their claims with the receiver on or before August 10, 1915 (tr. pp. 343-344). Thereafter numerous creditors intervened or filed their claims in the receivership suit. The claim of appellee Carl J. Hahn was filed May 19, 1915 (tr. pp. 316-318); that of the appellant American Water Works and Electric Company on August 5, 1915, (tr. pp. 325 to 338). On August 10, 1915, the appellees L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, filed their claim with said receiver and also filed with the Clerk of the Court a petition to intervene and as well as a pleading dominated a cross-bill of complaint. These papers, after setting forth the facts with respect to their claim state that such claimants are entitled to participate in the distribution of the assets of said power company and to receive their proportionate share thereof to which the then value of said claim might entitle them (tr. pp. 320-324). On August 14, 1915, the appellee Jake M. Shank filed his claim with said receiver (tr. pp. 338-339).

These claims were subsequently presented to the Court and allowed; that of appellees L. M. Plumer and E. B. Scull, executors, on October 16, 1915 (tr. p. 34); that of Guy I. Towle in October 23, 1915, (tr. p. 343); and that of Jake M. Shank on October 25, 1915 (tr. p. 341).

Prior to this time and on April 14, 1915, the appellee The Equitable Trust Company of New York, as sole trustee, under a deed of trust made by the power company dated May 1, 1910, and supplemental mortgages made by said power company dated June 21, 1911, and April 7, 1913, filed in this Court, wherein the administration suit was pending, its bill of complaint, and on September 16, 1915, a supplemental bill of complaint to foreclose the



deed of trust and supplemental mortgages above referred to (tr. pp. 7-64), and which had been given by the power company as security for a bond issue. The bonds were held by the Guaranty Trust Company of New York, and it has also filed with the receiver its claim therefor. The parties defendant to the bill were the power company, William T. Wallace, its receiver, Guy I. Towle, the complainant in the administration suit, and Carl J. Hahn, who as administrator of the estate of Harry M. King, deceased, had an unpaid judgment against the power company.

The receiver and the power company entered their appearances on May 3, 1915. On May 15, 1915, Hahn, Administrator, filed his answer, not denying any of the allegations of the bill of the Equitable Trust Company but setting out in detail the facts with respect to the claim upon which he had previously secured a judgment against the power company and in addition he averred that the trust company had permitted the power company and its receiver to remain in possession of the mortgaged property and of the income derived from the operation thereof and had out of such income paid current operating expenses as well as betterments and interest upon the bonds all of which had been entered to the benefit of the bondholders. That neither the original nor the supplemental mortgage covers the gross assets and income but that their lien extends only to the net assets and income after possession taken under the mortgage and then only subject to the payment of general running and operating expenses. The answer prays that the Hahn judgment be preferred over the mortgage and all other claims, and be paid out of income derived from the operation of the property or, if that be insufficient, then out of the corpus of the property

and that an accounting be had to determine the amount of current income and of all diversions (tr. pp 88-99).

It will be noticed that no attack is made by Hahn's answer either upon the validity of the mortgage or the extent of its lien, the matters presented and the superior equities claimed being such as are commonly urged in the administration suits under what is known as the "Six Months Rule," and perhaps cognizable only there.

On this state of the pleadings, the suit was set to be tried on Monday, October 25, 1915. On Saturday, October 23, 1915, Towle and Pulmer and Scull, as executors, and, on October 25, 1915, Shank, filed their answers, in which, after setting out their respective claims against the power company, they allege that the mortgage sought to be foreclosed, while good as to the realty, lacked the affidavit of good faith on the part of the mortgagor required by the statute of Idaho in the case of chattel mortgages and that it was not in fact filed as such in the office of the proper recording officer. Leave to intervene had been granted Plumer and Scull, executors, and to Shank on the dates of the filing of their respective answers. Towle was already a party defendant but had not answered until then, and at the time of answering was in default.

Motions to dismiss the petitions to intervene and to strike the answers were promptly made (tr. pp. 130-140) and overruled (tr. p. 141). The allegations of the answers were by agreement deemed denied (tr. p. 141).

The receiver had appeared but had not pleaded and by direction of Court he filed his answer on the morning of October 26, 1915, the day upon which the taking of evidence actually began. The averments of the bill were generally admitted; question was raised as to property covered by the mortgages—particularly with respect to

certain after-acquired property and personalty, description of which property is contained in the answer; and the receiver prays that, having found the amount due on the bonds, only so much of the property of the power company be sold as is covered by the liens of the mortgages; and that the receiver be given all proper relief.

After the close of the trial on October 27, 1915, the cause was taken under advisement. On November 17, 1915, Judge Dietrich filed his decision herein directing the foreclosure of the mortgage but sustaining the contention of the receiver and of Towle, Plummer and Scull, executors, and Shank as to certain of the personalty and directing that either party might introduce further evidence for the purpose of more completely identifying the property as to which the claims of these parties as well as that of Hahn, executor, were held to be superior not only to the lien of the mortgage but to claims of all other general creditors, but the fund was directed to be distributed to them alone. In other words, the proceeds of this property to be placed in a fund to be known as "Unsecured Creditors' Fund," and it was to be distributed to them to the exclusion of all other general creditors. A stipulation was entered into between counsel appearing upon the trial consenting to the sale of all the property as an entirety and decree was entered accordingly on December 6th, 1915, containing a provision for two funds called the "Bond Fund" and "Unsecured Creditors' Fund" and providing that the proceeds of the sale of the property as an entirety should be apportioned to the two funds according to the relative value of the property upon which the mortgage was decreed to be a first lien and that as to which Hahn, Towle and the interveners were decreed a superior lien.

Later, it was stipulated the value of the latter class of

property was \$45,000.00 and that the sum should be paid out of the proceeds of sale of the entire property into the "Unsecured Creditors' Fund" (tr. pp. 210-212). The sale under the decree having been had and confirmed, the stipulation was complied with and the special beneficiaries of the fund promptly moved the Court for an order directing the special master to apportion the same among them (tr. pp. 224-40).

Going back now to the administration suit, we have seen that the receiver had given notice to creditors to prove their claims and that all the parties interested in this appeal had made such proof within the time allowed by the order. The claims had been reported to the Court by the receiver but no action had been taken upon them except that on October 16th, 1915, Plummer and Scull, executors, and a few days later, Hahn, administrator, Towle and Shank presented their claims to the Court *ex parte* and wholly without the knowledge of any other general creditor. This was immediately prior to the trial of the foreclosure suit. The claims were allowed and the intervention in the foreclosure suit immediately followed. The sale under the decree was advertised for January 8th, 1916.

Shortly after or about the time of the entry of the decree, the appellant here, American Water Works and Electric Company, learning for the first time of the allowance *ex parte* of the claims of Hahn, Towle and the intervenors, and also learning then for the first time of the proceedings taken by Hahn, Towle, and the intervenors as well as by the receiver in the foreclosure suit, applied to the Court for the allowance of its claims *ex parte* as had been done in the case of other claimants, but such allowance was refused and on December 24, 1916, the Court made an order in the administration suit, requiring all persons interested



and who desired to contest the validity or the amount due upon any claim filed with the receiver to file their objections thereto on or before January 17, 1916, and that a hearing thereon would be had on the 14th day of February, 1916 (tr. p. 346). No objection of any kind was filed to the claim of the American Water Works and Electric Company and its claim was accordingly approved, and on that day it presented to the Court its petition for leave to intervene and its complaint in intervention (tr. pp. 269 to 285).

The petition so presented sets forth that the appellant had filed its claim with the receiver as required by the order of the Court and the notice of the receiver; that it had an interest in the property and assets of the power company; that such assets were about to be distributed by the special master to a small number of general creditors to the exclusion of the appellant and the greater part of the general creditors and prayed leave to intervene and that the assets of the power company be not distributed or otherwise disposed of until after the hearing of the bill in intervention of the appellant, but that such assets be then paid to the receiver for distribution to the general creditors of the power company (tr. pp. 270-272).

The bill of complaint tendered by the appellant in connection with its petition set forth the proceedings in the receivership suit; that prior to the time set for the hearing and allowance of claims, the Court at chambers *ex parte* and without the knowledge of this appellant allowed the claims of said appellees, Guy I. Towle, Carl H. Hahn, administrator, Jake M. Shank and L. M. Plummer and E. B. Scull, executors; that the said appellees without either notice or knowledge thereof by the appellant intervened and filed their answers in the foreclosure suit for the purpose of acquiring a preference and set up a lien and in-

terest superior to that of the receiver and prayed that the Court adjudge and decree that the assets of the power company not decreed to be subject to the lien of the trustee be turned over to the receiver of the power company to be held and distributed by said receiver equitably and ratably, in the receivership suit (tr. pp. 273-284). The Court, on the same day, disallowed said petition and complaint, but granted the appellant additional time in which to make a further showing (tr. p. 285).

On February 22, 1916, without any notice whatever to the appellant herein, Towle and the other special claimants filed in the foreclosure suit their petition for an order directing the special master to distribute to them the "Unsecured Creditors' Fund," thus paying their claims in full. Incidentally learning of this application, the appellant here on the same day set for the hearing of the petition to distribute that fund, presented to the Court its complaint in intervention which had been amended in certain respects to meet the requirements of the Court.

This application of appellant came on to be heard on the 29th day of February, 1916. No pleading or motion was filed by any party to the suit attacking the application and no objections or any showing was made or any evidence introduced. The Court, however, on the same day, from the bench denied the petition of appellant (tr. p. 302), and although upon the hearing of said petition and amended complaint no evidence was introduced by any party and no objection filed thereto, the Court nevertheless in reaching its conclusion considered in addition to the petition and amended complaint of the appellant all of proceedings, and other matters shown by a great mass of papers and records in the suit, all of which are referred

to and set out in the statement of the Court (tr. pp. 310-315).

The original of this amended complaint had been sent to New York, the place of residence of the President of the Company, for verification in accordance with the facts as they appeared, but consent was given to the use of the unverified complaint with the understanding that the amended complaint in intervention verified by the proper officer should be lodged as of February 28, 1916 (tr. pp. 286-301).

Paragraph XVIII of the amended complaint was found by the verifying officer not to be exactly true in point of fact and it was accordingly changed so as to conform to the truth. As verified, the paragraph sets forth that the appellant had made no assignment of the claim but had retained it and still retained the title to the claim and that the National Securities Corporation had no authority or control through stock ownership or otherwise over the intervenor (tr. p. 314 and see p. 299 for this paragraph as it appeared before change by the verifying officer).

Thereafter, on March 1, 1916, the Court made and entered its order denying appellant the right to intervene in the foreclosure suit (tr. p. 309); and on the same day directed the special master in the foreclosure suit to pay in full the claims of the appellees Guy I. Towle, Carl J. Hahn, administrator, Jake M. Shank, L. M. Plumer and E. B. Scull, executors (tr. pp. 240-242). Thus the Court below in effect held that certain assets of the power company then in its exclusive custody and control were not subject to the lien of the trustee under the trust deed and mortgages but it refused and denied the appellant not only any share in the distribution of those particular assets but also the right to have its claim to them heard and

the facts with respect to that claim determined in the only court having any jurisdiction over the subject matter.

The appellant and all other general creditors were represented in the foreclosure suit by the receiver. The Court having held that the particular property and assets of the power company involved in this appeal were subject to a superior lien existing in favor of all general creditors and acquired by them by virtue of the appointment of the receiver and the filing of their claims and allowance thereof in the administration suit, denied appellants any right thereto in common with all other general creditors, but ordered that these assets be distributed to certain of the general creditors to the exclusion of all the others. Such is the effect of the decision. The particular right denied was that of intervention prayed for so that appellant might establish its interest in and claim to a fund then in the exclusive custody of the Court and which the Court was about to distribute in such manner that appellant would be wholly remediless and would suffer the loss of its entire interest in that fund. From this action by the Court below appellant appeals.

### SPECIFICATION OF ERRORS.

The errors relied upon stated fully in the record (Trans. 348-351) are in general as follows:

1. The Court erred in holding that the petition and complaint in intervention of the appellant American Water Works and Electric Company, were insufficient and in denying the same and requiring said appellant to make a further showing.
2. That the Court erred in holding the petition and amended complaint in intervention of the appellant insufficient and in denying appellant leave to intervene and



the right to have determined its claim and interest in a certain fund in the exclusive jurisdiction, dominion and control of the Court.

3. That the Court erred in ordering the distribution of said "Unsecured Creditors' Fund" to a certain few general creditors to the exclusion of the appellant and all other creditors without giving appellant an opportunity to establish its interest in said fund; and in denying the appellant the right to have such fund equitably and ratably distributed among all general creditors having an interest therein.

## POINTS AND AUTHORITIES.

### I.

When a corporation becomes insolvent, and the corporate assets have passed into the hands of a receiver, such assets constitute a fund for ratable distribution among its creditors; and no creditor can by any subsequent proceedings acquire a greater interest in or preference to the trust fund so sequestered.

Clark v. Bacorn, 116 Fed. 617, 54 C. C. A. 73;

Thompson v. Huron Lbr. Co., 4 Wash. 600, 30 Pac. 741;

Thomas vs. Cincinnati N. O. & T. P. Ry. Co., 91 Fed. 202;

H. K. Porter Co. v. Boyd, 171 Fed. 305, 98 C. C. A. 160;

Bailey v. Mosher, 63 Fed. 488, 11 C. C. A. 304;

P. S. Co. v. New York C. Ry. Co., 198 Fed. 721, at page 738, 117 C. C. A. 491;

Shaffer v. McCulloch, 192 Fed. 801;

Chemical National Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155.

## II.

Where one claims an interest in a fund or specific property in the exclusive jurisdiction and subject to the exclusive dominion, custody and disposition of a Court and his interest therein can be established, preserved or enforced in no other way than by the determination and action of that Court, he has an absolute right to intervene and to review by appeal an order refusing such right.

Simpkins Fed. Eq. Suit, p. 485.

Foster, Federal Practice, secs. 258, 259.

W. U. Tel. Co. v. U. S. & Mexican Trust Co., 221 Fed. 545.

Credits Com. Co. v. U. S., 91 Fed. 570, 34 C. C. A. 12.

Credits Com. Co. v. U. S., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. ed. 782.

U. S. Trust Co. v. Chicago Terminal R. R. Co., 188 Fed. 292, 110 C. C. A. 270.

Minot v. Masten, 95 Fed. 734, 37 C. C. A. 234.

Tift v. Southern R. R. Co., 159 Fed. 555.

Illinois Steel Co. v. Ramsey, 176 Fed. 853, 100 C. C. A. 323.

Central Trust Co. v. Chicago R. I. & P. R. Co., 218 Fed. 336, 134 C. C. A. 144.

U. S. v. N. W. Development Co., 203 Fed. 960.

Savings and Trust Co. v. Bear Valley Irri. Co., 93 Fed. 339.

In re Columbia R. E. Co., 112 Fed. 643, 50 C. C. A. 406.

Thomasson v. Guaranty Trust Co., 159 Fed. 126, 86 C. C. A. 514.

## ARGUMENT.

## I.

While the complaint in the suit brought by Towle against the Great Shoshone and Twin Falls Water Power Company specifically states that that company was not insolvent, but that on the other hand its assets greatly exceeded its liabilities, the true situation was disclosed shortly after the filing of the bill. It then became apparent that the power company was wholly insolvent and that its general creditors holding claims aggregating several million of dollars would receive but a small fraction of the amount due them. The Towle suit is admittedly one for the general administration of the assets of the power company and through it that company's property will be sold, its creditors paid in part and its affairs wound up. It is in nowise different from the ordinary general creditors suit of which we have frequent examples.

In the present case, upon the filing of the bill a receiver was appointed, who, under the order of the Court, took immediate possession of all of the assets of the defendant. Leaving out of consideration the rights of the secured creditors, those general creditors who thereafter joined in the proceedings, and proved their claims acquired certain definite rights with respect to the assets of the defendant, the most important of which are that no one should thereafter be permitted to obtain by judicial proceedings or otherwise any claim or interest therein superior to theirs and that when such assets were converted into cash, that cash after the payment of the expenses of administration and secured debts properly payable out of the fund, should be distributed ratably to them.

It is not necessary for this appellant to discuss in this

brief the exact nature of the interest in the property of the power company so acquired in the receivership suit, in that this proposition will be ably and thoroughly discussed by the appellees Hahn, Towle, Shank, and Plumer and Scull (hereinafter sometimes called special claimants). Insofar as these appellees contend that they, as creditors, have an interest in the general assets of the insolvent corporation and that the lien of the trustee does not cover certain personal property of the power company, this appellant is in accord and makes the same contentions.

This appellant, however, makes the further and special contention that whether these appellees or whether the receiver sets up these rights and makes these contentions, inasmuch as the rights of these appellees are based expressly upon those acquired in common with all other general creditors by virtue of the general creditors' suit, such general assets belong to the receiver to be equitably and ratably distributed among all the general creditors in the general creditors' suit.

As one of these general creditors this appellant has the same interest and exactly the same right with respect to the property involved herein and its status is in nowise different from that of these appellees. We are not now speaking of proceedings subsequently taken and by which it is contended that in some manner certain general creditors became possessed of additional rights or equities over and above those had by other general creditors, but we are dealing only with that right upon which ultimately must rest any and every claim any general creditor can properly make to the assets of the insolvent corporation whose property is being administered in a general creditors' suit. The rule of law underlying this common status of both



this appellant and the special claimants here is so well established that reference need be made to no more than a few of the cases in which this rule has been considered.

Clark v. Bacorn, 116 Fed. 617.

Shaffer v. McCulloch, 192 Fed. 801; 113 C. C. A. 535.

Tompson v. Huron Lumber Co. 4 Wash. 600; 30 Pac. 741.

Haehnlen v. Druyton, 192 Fed. 300; 112 C. C. A. 558.

Chemical Nat. Bank v. Armstrong, 59 Fed. 372; 8 C. C. A. 155.

Bailey v. Mosher, 63 Fed. 488.

H. K. Porter v. Boyd, 171 Fed. 305; 98 C. C. A. 160.

Penn. S. Co. v. N. Y. C. Ry. Co. 198 Fed. 721, at 738; 117 C. C. A. 491.

So, then, appellant and these special claimants had at least up to the time of the latter's intervention in the foreclosure suit, interests in the assets of the power company of exactly the same nature and dependent upon precisely the same judicial proceedings.

## II.

The property with respect to which all general creditors of the power company thus had an interest was in the possession of the receiver appointed by that Court in which the mortgage thereon was being foreclosed, and both Wallace, the receiver, and Towle, the complainant in the general creditors' suit, were parties defendant in the foreclosure suit. In its bill of foreclosure the trustee contended that the lien of its mortgages covered all of the defendant's property of every kind, and it sought to have

that property sold by a special master appointed for that purpose in the foreclosure suit and to have the proceeds paid not to the receiver but to the special master, so that he might pay them to the trustee for the use of the bondholders. The effect of such action would have been to have taken from the possession of the receiver all the properties and assets of the defendant, then to have converted the same into cash, to have placed that cash in the custody of another agency of the Court and to have divested the general creditors of their interest in the same. The receiver by his answer in the foreclosure suit alleged that the lien of the trustee's mortgage did not cover certain personalty, pointing out quite specifically the property not so covered, and as to it he sought to have the decree so limited that this property should not be sold under foreclosure but should remain in his possession for administration in the general creditor's suit. Such at least was the necessary effect and his contention was sustained.

Moreover, certain parties to the foreclosure suit Towle (but not Hahn) and certain intervenors, Shank and Plummer and Scull, executors, all of whom had joined in the proceedings in the general creditors' suit, were seeking to secure exactly the same relief as prayed for by the receiver, except that they sought to have the Court direct the receiver to pay them first out of the proceeds of the property not covered by the mortgage, thus making them preferred creditors to that extent.

Thus we have a special property or a special fund, the proceeds of that property, in the possession of a Court of competent, exclusive and general jurisdiction charged with and engaged in its administration and distribution. And we likewise have a claimant, the appellant here, having or

at least claiming to have a definite interest in that property or fund.

Admittedly, if appellant had any such interest in the fund, it must either forego that claim or present it to the Court having possession of the property and exclusive jurisdiction with respect thereto and was then about to convert the property into cash and to distribute it in such manner as would leave appellant with no hope or possibility of recovering any part of it after such distribution, no matter how well founded might be its claim to the same.

Under these circumstances, appellant came into that Court with its petition for leave to intervene and tendered its bill of complaint in intervention setting forth as we have seen all the facts in relation to the matter and praying that after it had established those facts by proper proof, the fund might be paid to the receiver for distribution under direction of the Court in the administration suit and for general relief.

Leave to intervene is not ordinarily an absolute right but lies in the sound discretion of the Court to be granted or refused according to the exigency of the particular case, and while that discretion is usually exercised in favor of the petitioner so that a multiplicity of suits may be avoided and justice speedily done, yet it may properly in many cases be denied. There is, however, a class of cases in which intervention does not rest upon discretion but is an absolute right, since it rests upon grounds of necessity and the inability of the intervener to obtain the relief he is entitled to by any other means.

Simkins, Fed. Eq. Suit, p. 485.

Foster, Fed. Prac. Secs. 258-259.

Western Union Tel. Co. v. U. S. & Mex. Trust Co.  
221 Fed. 545.

- Credits Commutation Co. v. U. S. 177 U. S. 311;  
44 L. Ed. 782.
- Credits Commutation Co. v. U. S. 91 Fed. 570; 34  
C. C. A. 12.
- Tift v. Southern Ry. Co. 159 Fed. 558.
- Illinois Steel Co. v. Ramsey, 176 Fed. 853; 100  
C. C. A. 323.
- Minot v. Mostin, 95 Fed. 734; 37 C. C. A. 234.
- U. S. v. Philips, 107 U. S. 824; 46 C. C. A. 660.
- U. S. Trust Co. v. Chicago Term. Co. 188 Fed. 292;  
110 C. C. A. 270.
- U. S. v. Northwestern Development Co. 203 Fed.  
960.
- In re Columbia R. E. Co. 112 Fed. 643; 50 C. C. A.  
406.
- Thomasson v. Guaranty Trust Co. 159 Fed. 126; 86  
C. C. A. 514.

The application of this rule to the facts here would seem to be clear. The Court, by entertaining the creditors' suit, by the appointment therein of the receiver, who under the direction of the Court took possession of the property in question, and by its restraining and enjoining all persons from attaching, levying upon or seizing any of that property, took to itself the entire and exclusive jurisdiction of the subject matter. No other Court might thereafter properly undertake to direct the disposition of the property or the distribution of its proceeds. Appellant had or claimed to have an interest in that property then in the custody of the Court. Appellant could go nowhere else for relief and the Court had unquestioned authority to grant all the relief it sought; and the circumstances of the case were such that if appellant permitted the fund to be



distributed to Hahn and the other claimants acting with him, its claim to the fund would be entirely lost and it would be wholly remediless.

Thus we have here a fund in the custody of a Court that is about to distribute it in such manner that will place it beyond the possibility of recovery by anyone and we also have a creditor who had an interest in that fund and who seeks to intervene that it may have determined the nature and extent of that interest.

We contend that the facts and circumstances of this case clearly bring appellant within the rule that allows such intervention as a matter of right.

Such was not the view of the District Court. It regarded the granting or denying of the application to intervene as wholly a matter within its discretion. This is made clear from the memorandum decision wherein it speaks of appellant as asking "the Court to exercise a liberal discretion in its favor." As we shall see hereafter, appellant was not denied leave to intervene by reason of any matter appearing upon its petition and complaint or amended complaint, but upon matters wholly extrinsic, believed by the Court to be true and to warrant the action taken but the truth of which appellant had no opportunity to deny or to show matters in avoidance.

### III.

In addition to or as supplementing the proposition that leave to intervene under the circumstances of the case lay wholly within the discretion of the chancellor, the decision of the Court below seems to rest upon two propositions: first, that the special claimants had by their efforts caused the "Unsecured Creditors' Fund" to come into existence and then that appellant had been guilty of laches.

So far as the matter of discretion is concerned we have sought to show that the facts here bring appellant's application within that class of cases wherein intervention is a matter of absolute right; and that under those facts and that rule appellant did not "ask the Court to exercise a liberal discretion in its favor," but sought that which might not properly be refused.

*Did Special Claimants Cause Fund to Come Into Existence?*

But by what efforts did these special claimants create the "unsecured Creditors' Fund" or to what extent may it properly be said to be the fruits of their efforts?

The facts in regard to this entire matter appear in appellant's complaint in intervention. It was under oath and no denial was made of any of its statements and they must therefore be deemed admitted.

It thus appears that, having joined in the general creditors' suit and having thus accepted the benefits of that action and assented to ratable distribution of the assets in the receiver's hands, these special claimants secured certain information vitally affecting the common interests of all general creditors. This information they chose not to communicate, either to the other general creditors or to the receiver appointed for their equal protection. On the contrary, they deliberately sought to use it so as to obtain some special advantage over their associate claimants in the administration suit. Accordingly, having obtained the ex parte allowance of their claims in that suit without knowledge of this appellant or the other creditors, the defendant Towle (but not *Hahn*) and the interveners again without the knowledge of this appellant or of the creditors equally interested filed their answers in the foreclosure

suit claiming special liens and equities as to certain property not only over the lien of the trustee's mortgage but to the exclusion of all other general creditors from any share therein.

Those, however, were not the only proceedings in the foreclosure suit taken with the purpose of defeating the trustee's lien upon the property in question here. The receiver, himself, representing all the general creditors, filed an answer, in which he described the property in question with a particularity lacking in the answers of Towle and his associates and he pleaded that questions of law which arise with regard to various of the parcels of property as to whether they are included within the terms of the said trust deed or mortgages set forth in the bill of complaint; he showed the facts that defeat the trustee's lien, and prayed that only so much of the property of the defendant be sold as is covered by the trustee's mortgages and for general relief. It is true that his answer does not specially point out the lack of the required affidavit or that the mortgages had not been filed as a chattel mortgage, but upon the issues as made by the receiver's answer all the relief claimed by Towle and the interveners would properly have been granted. Under it, the Receiver not only could properly urge that the mortgage was void or ineffective as against claims of creditors because of the matters above referred to *but he did actually join at the trial in urging this defense.* The decision of the District Judge specifically so states (tr. pp. 181-2). So Towle and the interveners did not urge any defense that would not otherwise have been presented, nor did they take any independent action upon the trial. They and the Receiver acted together and he as much as they made the defense against the mortgage.

But the defendant Hahn stands in quite a different position. Instead of answering after he had become in default as Towle had done, he answered promptly, but nowhere did he either directly or indirectly raise the issues upon which the defense was based. On the contrary, he admits, by not denying, the claim of the trustee to the entire property. His whole answer, so far as it sets out any defensive matter, is concerned with a claim for preference under the Six Months Rule growing out of diversions of income and the like. No relief whatever could have been granted to him under issues of *his* answer; but nevertheless he was awarded an interest in the property not only over the lien of the trustee's mortgage, but also an interest in that property to the exclusion of this appellant. On whose answer was this relief granted to Hahn? What did Hahn contribute to the defense? So far as he was concerned, the only way in which any relief could have been granted was through issues made and the contentions urged by the receiver. Thus, the appellant, who was represented by the receiver, is denied all participation in the fund despite the receiver's answer, while Hahn is awarded a decree upon an answer that does not raise the defense but admits the validity of the mortgage. So we insist the decree is not the result of the diligence of any of these special beneficiaries.

### *Laches.*

But the decision of the Court below was largely affected by the consideration, that appellant had been guilty of laches. The grounds on which this charge is alleged to rest are that appellant did not seek to intervene until the hour set for the confirmation of the sale (February 14, 1916); that knowing of the pendency



of the foreclosure suit and presumably being advised of its rights, it chose to remain silent and inactive and that its claim in the administration suit, while duly filed, had not been allowed. Other contentions may be urged in this Court but they will not be the ones consideration of which Court but they will not be the ones in consideration of which the Court denied the petition to intervene.

In discussing this phase of the case, the District Judge has stated in his memorandum decision that appellant must have known of the pendency of the foreclosure suit and was presumably advised as to its rights. If by that it is meant that appellant knew of the defects in the mortgages, there is not only nothing in the record upon which to base any such statement and it is not true. The fact seems to be that no one knew of these defects until immediately before the trial, and there is nothing in the record upon which to base the assertion that appellant knew of the matter until long after the trial. The special claimants themselves did not acquire the information until after the case had been set, or so we may conclude from the fact that their answers were not filed until a day or two before the trial. This is true of all the special claimants except Hahn, whose answer was filed some months previously, but as we have seen it does not raise this issue.

But on the Court's own theory, appellant could not be let into the defense until after its claim had been allowed, such allowance was had February 14, 1916, and on that very day appellant presented to the Court its petition for and complaint in intervention.

But the special claimants will undoubtedly urge that this was too late. But why too late? The fund was still in the possession of the Court wholly undistributed and the delay, if there was any delay, in securing the allowance

of the claim had resulted in not the slightest injury of any kind to the special claimants. The fact the claim was not allowed until February 14 would therefore seem to be no reason for denying appellants its share in that fund.

It is not fair, however, to say that appellant did not move in this matter until the day of the confirmation of the sale. That was the day on which it presented its first petition to intervene; but long prior thereto, and very shortly after the decree, it had applied to the Court below for an *ex parte* allowance of its claim and this application was denied on the very good ground that there should be a general order with respect to all claims. And it was not counsel for the receiver but counsel for the appellant here who, on December 24, 1915, after the application for allowance of its claims *ex parte* had been denied, drafted and caused to be signed and filed the general order with respect to the proof of claims. The date for the hearing of objections to claims was fixed as of February 14, 1916, because of the intended (and actual) absence of the District Judge from the jurisdiction from the latter part of December, 1915, until about that time. It was not in anywise the fault of the appellant here that its application was not presented sooner or that its claim was not allowed at an earlier date.

But it will be urged by appellees that some of the statements in the last paragraph and which are urged as avoiding the charge of laches do not appear in the record and therefore cannot be considered here. The difficulty with that contention rests on the ground that there has been an entire inversion of the usual rules with respect to the matter of laches. Relief was denied appellant because of laches in that it had remained silent and inactive, although knowing of the fact of the pendency of the cause and pre-

sumably knowing of the defense that might be made, and further that it had not had its claim allowed seasonably. But the complaint in intervention specifically alleges that the appellant did not know of the allowance of claims of Hahn and his associates and did not know that that case had come to trial. These are matters of fact. The defense to the complaint in intervention is laches and appellees deny certain statements contained in the complaint and urge other matters not appearing on the face of that pleading or elsewhere on the record upon which the application was made and heard. These are issues of fact upon which appellant was entitled to its day in court. If the charges are true, they should have their proper effect, but appellant ought not to be denied the right to meet them. Every inference that can be drawn from papers not a part of the record upon which the application for intervention was presented or heard, every suggestion of a possible adverse fact or circumstance, every vague impression gained from statements or proceedings to which appellant was not a party ought not to be permitted either to outweigh positive allegations to the contrary or to be accepted as reasons for denying appellant's application. It would have taken but a few weeks at the outside to have framed the issues and tried the right to intervene upon the merits.

It is impossible to read the opinion of the District Court without seeing that his decision was largely influenced by the thought that if he knew all the facts there would appear somewhere among them sufficient reason for denying the application on the ground of laches.

The District Judge believed that the granting of the petition was a matter within his discretion and he considered that appellant was calling upon him not to exercise

the usual but a liberal discretion in its favor. Under these circumstances it was perfectly natural, perhaps, that he should decide the application not wholly upon the record presented to him at the time, but that he should consider it from a much larger view point. Thus we find the grounds upon which the opinion and decision in this case rest consists of a series of presumptions not supported by the record before the Court. It was assumed that appellant was informed at all times as to proceedings in the foreclosure suit; that it knew of the defects in the mortgage and that certain creditors were attempting to defeat it as to certain property because of that defect; that appellant deliberately refrained from joining in the efforts being made by those creditors but on the contrary sought to aid the trustee in respect to that matter; and that as soon as the decree had been entered awarding to the special claimants the fund in controversy, it promptly appeared for the purpose of despoiling them of the fruits of a hard won victory. None of these matters appeared upon the face of the record presented to the District Judge upon appellant's application. If these are the facts of the case it may very well be that appellant should be denied all relief, but it denies that these are facts. It was impossible for it to have anticipated that any such matters would be considered by the Court. It was thus denied its opportunity to meet them, to show what the truth is in respect thereto. Answers should have been filed urging these and any other defensive matters that were thought to exist, and upon these issues a hearing should be had.

Where the allowance of the application is entirely within the discretion of the chancellor, it doubtless many times happens that that discretion is exercised as it was in this case, but where it presents a matter of right we insist



that it should be granted or denied upon the record without indulging in presumptions or the consideration of impressions not in anywise supported thereby.

In considering the matter of the distribution of the "Unsecured Creditors' Fund" it must not be overlooked that the proceedings by which the property was taken from the receiver and given over to the special master for distribution to the special creditors, were taken prior to the general allowance of claims and thus falls, as we understand it, within the inhibition of the rule laid down by this Court in the case of *American Surety Company vs. Mills et al.*, decided on or about May 1st, 1916, and still unreported.

*Would the Allowance of the Application Result in Any Injustice to the Special Claimant?*

It was also urged that if appellant's intervention was allowed some injury might result to the special claimants because proceedings taken with respect to fixing the value of the property held not to be covered by the mortgage and laches are charged to appellant in this matter.

Thus reference is made in the opinion to a stipulation fixing the value of the personalty not covered by the prior lien of the mortgage at a sum sufficient only to cover the debts due the preferred claimants and it is suggested that if these claimants had known that appellant was about to press its claim to that property, possibly a greater value than \$45,000.00 would either have been stipulated or fixed after hearing. The stipulation with respect to this matter was signed by counsel December 24, 1915, and the order was made December 27, and both stipulation and order were filed on December 29. Every counsel connected with the case knew perfectly well sometime prior thereto that the appellant was preparing to do exactly

what later it did. After its application for the *ex parte* allowances of its claim had been denied, appellant's solicitors prepared and presented the order of December 24th, fixing the date upon which all claims would be allowed or rejected. A copy of that order was immediately sent to the solicitor of every general creditor.

However, if it be true that the property in question is of greater value than \$45,000.00, no one is more interested in that fact than appellant, and its solicitors will very gladly join those of the special claimants in asking that it and they be relieved therefrom and that the true value be fixed. We entertain as little doubt as do they that, from what the District Judge said from the bench in regard to this matter, immediate relief will be granted; but we again urge that in this respect, as in respect to all other grounds upon which appellant's application was denied, presumptions were indulged in against appellant that have no foundation so far as the record presented to the District Judge is concerned and that if it claimed to have any foundation in fact, then the appellant ought to have the opportunity of meeting them.

So no injury will result to the special claimants by reason of appellant's intervention. They will secure exactly the distributive share to which they are entitled.

Besides this appellant has expressly offered in his complaint to pay its proportionate part of all costs, expenses, outlays and attorneys' fees incurred by them (p. 299).

While the allowance of appellant's intervention and the consequent participation by all general creditors in the fund will result in no injury to the special claimants for the reason they will still receive their just and equitable share thereof, the denial of that intervention will result in depriving the other general creditors of their proper dis-

tributive share in the assets of the power company. In what manner did these other creditors lose their interests in that property, and by what right did these special claimants acquire it?

*Special Claimants' Position Without Equities.*

We have seen that, having secured information of vital importance to every general creditor in the administration suit, these special claimants did not disclose it to their associates. Had they desired to be fair, would they not have given notice as to the situation to those with whom they had joined in proceedings looking to the equitable and ratable distribution of the property of their common debtor? Why did they not ask the receiver to appear for all?

The only right to intervene in the foreclosure suit set up or claimed by them existed not by virtue of any special facts or special equities in their favor but was avowedly based and wholly rested upon the lien or status with respect to the property that had been secured to them in common with all other claimants by reason of the proceedings in the general creditors' suit. To permit those proceedings thus to be perverted and to be used as a means of defeating a ratable distribution of common trust funds, we contend is contrary to the equitable theory upon which creditors' suits rest, if it be not in violation of the injunction issued therein.

It may be that no contractual relation exists among those who join in a general creditors' suit, but an equitable relationship exists that carries with it the requirement of good faith upon the part of all. The suit was brought for the common benefit and for the express purpose of preventing any one creditor from getting an advantage over the

others or a larger relative share in the common trust fund. The special claimants assented to and became parties to those proceedings. The trust fund was placed in the hands of an officer of the court so that there might be, as there was in this case, an efficient and honest administration thereof and a ratable distribution of the proceeds. Can it be doubted that in honor and in good faith one creditor is precluded from using that status or lien upon the fund secured to him by his joining in such a suit as a means of appropriating to himself the entire trust fund?

The interest these special claimants had in the property in the hands of the receiver was such part thereof as was expressed by the ratio that the aggregate of their claims bore to the sum total of the claims of the general creditors. This of course does not take into consideration the sums due secured creditors or the expenses of administration. That was the extent of their lien or interest in the fund; and when they intervened in the foreclosure suit they could not properly claim a larger share in the fund than the proportionate interest as above indicated, if indeed they could under the circumstances act for themselves alone and not for all.

But these special claimants not only assented to becoming parties to the general creditors' suit but they also assented to and were bound by the injunction issued in that case which specifically forbade any person from seizing or levying upon the property of the power company. The purpose of that injunction was to preserve the then existing status and to prevent any creditor from acquiring a new or additional right to or greater distributive share in the property of the power company than he possessed at the time of the commencement of the creditors' suit.



These rights of creditors became fixed on that date, the only condition to their sharing in the fund pro rata being that they should thereafter file and prove their claims within the time and in the manner prescribed by the Court. There is no pretense but that those conditions have been fully met and complied with by the appellant and other general creditors. We therefore urge that these special claimants should not be permitted, under the facts in this case, to appropriate to themselves alone a fund that properly belongs to the entire body of general creditors.

The special claimants at the time of their intervention in the foreclosure suit had but a proportionate interest in the property in the hands of the receiver equitably distributable to them. The remaining and by far the larger interest belonged to appellant and the other general creditors. When and in what manner did these other creditors lose their interest in that property, and by what right did these special claimants acquire it?

We ask that the appellant here should have been granted leave to intervene and that the orders appealed from are erroneous and should be reversed.

Respectfully submitted,

WYMAN & WYMAN,

*Solicitors for Appellant,*

*American Water Works and Electric Company.*



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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,  
Appellees.

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellees.

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**Brief of Appellant, The Equitable Trust Company of New York.**

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

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MURRAY, PRENTICE & HOWLAND,  
Residence: New York, N. Y.;

RICHARDS & HAGA,  
J. L. EBERLE,

Residence: Boise, Idaho;  
*Solicitors for the Equitable  
Trust Company of New York.*





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,  
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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
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vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellees.

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**Brief of Appellant, The Equitable Trust Company of New York.**

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*Upon Appeal From the United States District Court for the District of Idaho, Southern Division.*

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**STATEMENT OF THE CASE.**

Appellant, The Equitable Trust Company of New York, has appealed from certain portions of the decree of foreclosure, decreeing and adjudging the lien

of its mortgage subject and subordinate to the claims of certain unsecured general creditors as to certain personal property of the mortgagor, Great Shoshone and Twin Falls Water Power Company, in the possession of the Receiver of that company appointed in a general creditors' suit, and which decree ordered the claims of such unsecured general creditors to be paid in full out of the proceeds from the sale of such property to the exclusion of all other general creditors.

This appellant has also appealed from an order made after sale under the foreclosure decree, directing the Special Master to pay in full out of the proceeds from the sale of such personal property the claims of such unsecured general creditors to the exclusion, as aforesaid, of other general creditors and the claim of appellant under its deficiency.

On November 2, 1914, the defendant Guy I. Towle, a creditor of the Great Shoshone and Twin Falls Water Power Company (hereinafter called the Power Company), commenced a suit in the United States District Court for the District of Idaho, Southern Division, against said Company for the appointment of a Receiver. The bill was in the nature of a general creditors' bill, setting forth the insolvency of the Power Company, its inability to meet its obligations, and that unless the Court took into judicial custody and administered the property of the Company for the protection of the rights of the complainant in that suit and other creditors of the Power Company there was great danger that the properties of the

defendant might not be operated as a continuous system and enterprise, and that a vast and unnecessary multiplicity of suits would result, and that irreparable injury, damage and loss would be caused to all the creditors and to the public (Rec. 164 to 166), and prayed the Court that the rights of the complainant and of all other creditors of the defendant might be ascertained and decreed, and that the Court fully administer the property and funds of the Company and marshal all the assets and ascertain the several and respective liens and priorities existing thereon and enforce and decree the rights, liens and equities of the creditors as the same might be finally ascertained by the Court. (Rec., 167 to 170.)

Thereafter, on November 2, 1914, the Court appointed the appellee William T. Wallace, hereinafter called the Receiver, as receiver of all properties of said Power Company, to hold, manage and operate the same for the protection and preservation of the respective rights and equities of all parties interested therein. (Rec. 170.) The Receiver took immediate possession of all the property, rights and franchises of the Power Company and continued in possession thereof until after the confirmation of sale on February 16, 1916.

On April 14, 191<sup>5</sup>, the appellant, The Equitable Trust Company of New York, hereinafter sometimes called the Trustee, commenced an independent suit in the same Court against the Great Shoshone and Twin Falls Water Power Company, William T. Wallace as Receiver of said Company, Guy I. Towle

(plaintiff in the general creditors' suit in which the Receiver had been appointed), and Carl J. Hahn, administrator of the estate of Harry M. King, deceased, for the foreclosure of a mortgage or deed of trust executed by the Power Company under date of May 1, 1910, and certain supplemental mortgages dated June 21, 1911, and April 7, 1913, respectively, alleging default in the payment of interest and seeking foreclosure to enforce the payment of such interest. Thereafter the principal was declared due for failure to pay the interest within the period of grace provided in the trust deed, and on September 16, 1915, a supplemental bill was filed seeking foreclosure as to both principal and interest. The bill and supplemental bill showed there was outstanding an issue of bonds of the par value of \$2,230,000, with interest from May 1, 1914, secured by a trust deed expressly covering all property of the Power Company, real, personal and mixed, and the income and earnings thereof. (Rec., 44, 45, 62, 63, 79.) The defendant Carl J. Hahn filed answer on May 15, 1915, setting up a judgment acquired against the Power Company on September 23, 1914 (Rec., 88-101). To this answer a reply was filed by the Trustee on October 2, 1915 (Rec., 101).

The cause was set for trial Monday, October 25, 1915, none of the defendants having filed an answer in the cause except the defendant Hahn. On October 16, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, having previously filed their claim for allowance in the general



creditors' suit, presented their claim to the Judge at Chambers, *ex parte*, and obtained the allowance or approval thereof in the general creditors' suit; and on Saturday, October 23rd, they presented to the Judge at Chambers a petition for leave to intervene in the foreclosure suit (Rec., 107) for the purpose of attacking the validity of the mortgage as a mortgage on personal property. An order permitting them to intervene was entered (Rec., 111) and they immediately filed their answer to the bill of complaint in the foreclosure suit (Rec., 111). The defendant Guy I. Towle on Saturday, October 23rd, *ex parte*, before the Judge at Chambers obtained the allowance or approval of his claim in the general creditors' suit, and thereupon and on the same day he filed his answer to the bill of complaint in the foreclosure suit, setting forth substantially the same facts and making the same contentions as the interveners Plumer and Scull (Rec., 102).

Complainant on October 25, 1915, moved to vacate the order permitting said interveners to intervene and to dismiss their petition in intervention and to strike their answer, for the reason that they did not have such interest in the litigation as would entitle them to intervene and be made parties defendant in the foreclosure suit (Rec., 130). A motion to strike the answer of the defendant Guy I. Towle was likewise filed by complainant on October 25th (Rec., 106). The appellee Jake M. Shank on October 25th, in the same manner as set forth above, obtained the allowance of his claim in the general creditors' suit,

by the Judge at Chambers, and obtained leave to intervene in the foreclosure suit (Rec., 130), and on the same date filed his answer in said foreclosure suit, similar in all respects to the answers previously filed by Plumer and Scull; and complainant on October 26th moved to vacate and set aside the order permitting Shank to intervene and to dismiss his petition in intervention and to strike his alleged answer, for the reason that he did not have such interest in the litigation involved in the foreclosure suit as to entitle him to intervene or be made a party defendant therein (Rec., 131-140).

The motions of the Trustee to vacate the order permitting the interveners to intervene and to strike the answers of said interveners and of defendant Guy I. Towle were overruled by the Court, and the cause came on for trial upon the bill of complaint and supplemental bill and amended bill, and the answers referred to and the answer of the Receiver (Rec., 81). On October 27, 1915, during the trial of the cause, the defendant Power Company lodged its answer admitting all the allegations of the bill and supplemental bill. During the trial the interveners Jake M. Shank, L. M. Plumer and E. B. Scull, and the defendants Carl J. Hahn, Guy I. Towle, and the Receiver of the Power Company, made the same objections relative to the recordation and execution of the deed of trust and supplemental mortgages, and denied that the Trustee had a prior lien on certain personal property of the Power Company. (Rec., 181, 182.)

On November 17, 1915, the Court rendered its decision, holding in substance that the general creditors who had obtained the allowance of their claims in the general creditors' suit, and who had appeared in the foreclosure suit, had such an interest in the personal property subject to the lien of the mortgage that they could contest the validity thereof, and that the lien of such general creditors whose claims had been thus allowed was superior to that of the Trustee upon certain articles of personalty; and on December 6, 1915, a decree was entered wherein it was ordered that the interveners mentioned above and the defendants Towle and Hahn, to the exclusion of all other creditors of the Power Company, should be paid in full out of the proceeds from the sale of the personal property upon which the Court had held that the lien of such general creditors was superior to the lien of the Trustee; and it was directed that the proceeds of such personal property should be placed by the Special Master in a fund denominated as the "Unsecured Creditors' Fund", and paid out and disbursed as aforesaid. (Rec., 191-192, 205-206.)

Prior to the entering of the decree, it was stipulated and agreed by and between all parties that in view of the decision of the Court and in view of the fact that it was to the interest of all parties, the property of the Power Company should be sold as an entirety and without delay; that the decree should provide for the sale of such property as an entirety, but that such sale should not be construed as a waiver of the right of appeal of any party to the cause as

to any matter relating to the distribution of the proceeds of sale, or as to any matter involved in the decision of the Court, but that all objections that might be raised on an appeal from the decree might be raised with the same force and effect on an appeal taken after the sale of such property under said decree (Rec., 187, 188). The property was thereafter sold by a Special Master appointed by the Court for that purpose, and the sale was duly confirmed on February 16, 1916 (Rec., 215). Prior to the sale and on December 24, 1915, all the parties to the foreclosure suit stipulated and agreed, in order to avoid the necessity of a hearing for the purpose of apportioning the proceeds of the sale as provided in paragraph 14 of the decree, that the personal property upon which the Court had decreed a prior lien in favor of certain general creditors as aforesaid was of the reasonable value of \$45,000, and that in apportioning the proceeds derived from the sale of the property of the Power Company the said sum of \$45,000 should be placed in what is called in the decree the "Unsecured Creditors' Fund", providing, however, that nothing contained in the stipulation should be construed as a waiver of any right by any of the parties to except or object to or appeal from any of the provisions of said decree of foreclosure or any order thereafter based upon or made pursuant to said decree (Rec., 211).

Thereafter and on February 22, 1916, the said Jake M. Shank, Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull peti-



tioned the Court for an order directing the Special Master appointed in the foreclosure suit to pay in full the claims of said general creditors (Rec., 224), and on March 1, 1916, the Court ordered the Special Master to pay the claims of said petitioning creditors in full with interest thereon from the date of the decree in the foreclosure suit (Rec., 240). The Court denied the right of the Receiver, as the representative of all creditors of the Power Company, to make the contest made by the particular creditors above named, but held that the general creditors who had been allowed to intervene in the foreclosure suit had, by virtue of the general creditors' suit and the filing of their claims in that suit, obtained a sufficient interest in the property covered by the mortgage to entitle them to contest the priority of the lien thereof, and a status superior to that of the Receiver who was in possession of the property as the representative of all creditors. The effect of the Court's ruling was to convert a general creditors' suit wherein equality and pro rata distribution as between creditors obtained, into a contrivance by which certain creditors could obtain a preference and priority over the Receiver and all other creditors.

The contention of the Trustee, complainant in the foreclosure suit, was (1) that under the laws of the State of Idaho as construed by its highest Court, a general creditor did not have such an interest in the property of the mortgagor that he could contest the lien of a chattel mortgage which was valid between the parties and to which objection could be

made only on the ground that it had not been filed so as to give notice to subsequent purchasers or encumbrancers; and (2) that if the mortgage was subject to attack for the reasons stated above, the contest should be made by the Receiver as the representative of all creditors, and the property, or the proceeds thereof, should be turned over to the Receiver in the general creditors' suit for equitable and pro rata distribution among all creditors. In the latter event, the Trustee would be entitled to its share of the proceeds, based on its deficiency; whereas, in the case at bar, the claims of the favored creditors aggregate sufficient to take all the proceeds of the property upon which the Court held the Trustee did not have a prior lien under its mortgage.

The following facts are not in dispute:

(1) Prior to the appointment of William T. Wallace as Receiver of the Power Company on November 2, 1914, neither the interveners Jake M. Shank, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, nor the defendants Guy I. Towle or Carl J. Hahn as administrator of the estate of Harry M. King, deceased, had acquired any lien, by process or otherwise, upon the personal property of the defendant Power Company involved in this appeal.

(2) That all parties to this cause, excepting, of course, the Power Company and its Receiver, have filed their claims with the Receiver in the general creditors' suit commenced by Guy I. Towle.

(3) That, by the terms of the mortgage or deed

of trust and supplemental mortgages foreclosed by the Trustee, all the property of the Power Company was expressly made subject to the lien of such mortgage or deed of trust, and that said instruments were executed as required by the laws of the State of Idaho relative to mortgages on real property, and were filed for record and recorded in the mortgage records of the several counties where property of the Power Company was situated, but said mortgages were not filed as chattel mortgages.

(4) That the Power Company is wholly insolvent and that the general creditors who are wholly dependent upon the dividends that will be paid in the general creditors' suit, will receive only a very small per cent of the amount due them.

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### ASSIGNMENT OF ERRORS.

The errors relied upon are set forth in considerable detail in the record (pp. 250-255). Stated generally, they are:

1. That the Court erred in decreeing that the lien of appellant's mortgage was subject and subordinate to the claims of general creditors as to certain personal property.

2. That the Court erred in holding that the defendants Guy I. Towle and Carl J. Hahn and the interveners L. M. Plumer, E. B. Scull and Jake M. Shank were entitled to contest the dignity or priority of the lien created by appellant's mortgage.

3. That the Court erred in giving the defendants Towle and Hahn, and the interveners Plumer, Scull

and Shank, a prior lien and claim upon certain personal property of the Power Company and in directing that the claims of said defendants and interveners be paid in full out of the proceeds from such property to the exclusion of all other creditors of the Power Company, including appellant as a creditor on account of its deficiency.

4. That the Court erred in not holding that if the mortgages of appellant were not valid liens against certain personal property of the Power Company, such property, or the proceeds thereof, should be turned over to the Receiver of the Company for distribution and administration in the general creditors' suit equitably between complainant and all other creditors of the Power Company.

5. That the Court erred in permitting the said interveners to intervene in the foreclosure suit, and in denying the motion of appellant to strike out the answers of said interveners and the answer of the defendant Towle.

6. That the Court erred in not giving appellant a first and prior lien upon all the property of the Power Company, as prayed for in its bill of complaint.

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#### POINTS AND AUTHORITIES.

(1) The District Court erred in holding that the appointment of a Receiver in a general creditors' suit operated to give to creditors filing their claims with such Receiver a lien upon the property of the debtor. In such cases the rule is that the appoint-



ment of a chancery Receiver in the Federal Courts in the absence of specific state decisions or statutory provisions giving special powers and rights in property to the Receiver, and where he is not appointed for the special purpose of impounding or levying upon certain specific property for the benefit of a certain person or class, does not change, add to, or detract from the title or determine the rights of any litigant party; and although it cuts off the right to acquire liens, it imposes none by virtue thereof but protects and preserves all rights and interests as of the date of the appointment of the Receiver.

Pomeroy, *Eq. Juris.*, vol. 4, 1336.

High on Receivers, sec. 5, p. 12.

Beach on Receivers, sec. 252.

Glenn, *Creditors' Rights and Remedies*, secs. 324-326.

Thompson, *Corporations* (2nd ed.), S. 6396.

*Central Trust Co., etc., v. Worcester Cycle Mfg. Co.*, 93 Fed. 712; 35 C. C. A. 547.

*Meyer v. Western Car Co.*, 102 U. S. 1, 26 L. ed. 59.

*Commonwealth Roofing Co. v. North American, etc., Co.*, 135 Fed. 984; 68 C. C. A. 418.

*Central Appalachian Co. v. Buchanan*, 90 Fed. 454; 33 C. C. A. 107.

*Schaffer v. McCulloch*, 192 Fed. 801; 113 C. C. A. 535.

*Quincy, Mo. & Pac. Ry. Co. v. Humphreys*, 145 U. S. 582; 12 Sup. Ct. 787; 36 L. ed. 632.

16      *The Equitable Trust Company, etc., vs.*

N. Y., P. & O. R. Co. v. N. Y., L. E. & W. R. Co., 58 Fed. 268.

Mercantile Trust Co. vs. Southern States, etc., Co., 86 Fed. 711; 30 C. C. A. 349.

Atlantic Trust Co. v. Dana, 128 Fed. 209; 62 C. C. A. 657.

Clark v. Bacorn, 116 Fed. 617; 54 C. C. A. 73.

Fosdick v. Schall, 99 U. S. 235, 251; 25 L. ed. 339.

Savings and Trust Co. of Cleveland v. Bear Valley Irri. Co., 93 Fed. 339.

Wiswall v. Sampson, 14 How. 52; 14 L. ed. 322.

Booth v. Clark, 17 How. 322; 15 L. ed. 164.

Chicago Union Bank v. Kansas City Bank, 136 U. S. 223; 10 Sup. Ct. 1013.

Kneeland v. American Loan and Trust Co., 136 U. S. 89; 10 Sup. Ct. 950; 34 L. ed. 379.

Hollins v. Brierfield Coal and Iron Co., 150 U. S. 371; 14 Sup. Ct. 127.

Richmond v. Irons, 121 U. S. 27; 7 Sup. Ct. 788.

Ames v. U. P. Ry. Co., 60 Fed. 966, 969; 74 Fed. 335; 20 C. C. A. 432.

Woodland v. Wise, 112 Md. 35; 76 Atl. 502.

National State Bank v. Vigo County National Bank, 141 Ind. 352; 40 N. E. 799.

Polk v. Johnson, (Ind.) 76 N. E. 634.

City Bank of Wheeling v. Bryan, (W. Va.) 86 S. E. 8.

Pacific Ry. Co. v. Wade, 91 Cal. 449; 27 Pac. 769.

Garniss v. Superior Court of San Francisco,  
88 Cal. 413; 26 Pac. 351.

William Von Roun v. Superior Court of San  
Francisco, 58 Cal. 358.

Cramer v. Iler, 63 Kansas 579; 66 Pac. 617.

Sumner Iron Works v. Wolten, 61 Wash. 689;  
112 Pac. 1108.

Ardmore Natl. Bank v. Briggs Machinery  
Co., 20 Okla. 427; 94 Pac. 533; 23 L. R. A.  
(N. S.) 1074.

(2) Where the decisions or statutes of any state give to a Receiver or assignee certain specific powers or rights in property, the Federal Court will follow such decisions and statutes as to the relation which such Receiver or assignee bears to such property.

Hamilton v. David C. Briggs Co., 179 Fed.  
949.

Dolle v. Cassell, 135 Fed. 52; 67 C. C. A. 526.

Bucher v. Cheshire R. R. Co., 125 U. S. 555;  
8 Sup. Ct. 974.

Etheridge v. Sperry, 139 U. S. 276, 277; 11  
Sup. Ct. 569.

Union Bank v. Kansas City Bank, 136 U. S.  
223; 10 Sup. Ct. 1013.

(3) In Idaho a chattel mortgage, unrecorded and unaccompanied by the affidavit of good faith required by sec. 3408, Idaho Revised Codes, is valid as to the parties and as to all creditors, excepting those having a lien upon the property by attachment or some process, and there are neither statutory provisions

nor decisions in the State of Idaho giving either a Receiver representing general creditors or such general creditors by virtue of the appointment of a Receiver a lien sufficient to contest such chattel mortgage.

Sec. 3408, Rev. Codes of Idaho.

Neustadter Bros. v. Doust, 13 Ida. 617; 92 Pac. 978.

Ryan v. Rogers, 14 Ida. 304; 94 Pac. 427.

Martin v. Holloway, 16 Ida. 513; 102 Pac. 3.

(4) Under sec. 3396, Rev. Stats. of Idaho, a simple contract creditor who in no way connects himself with an interest in the property by lien or attachment, is not such an interested party as to be entitled to intervene in a foreclosure suit.

Neustadter v. Doust, 13 Ida. 617; 92 Pac. 978.

Ryan v. Rogers, 14 Ida. 309; 94 Pac. 427.

Martin v. Holloway, 16 Ida. 513; 102 Pac. 3.

Horn v. Volcano Water Co., 13 Cal. 63; 73 Am. Dec. 569 and note.

Tompson v. Huron Lumber Co., 4 Wash. 600; 30 Pac. 741.

Brown v. Saul, 16 Am. Dec. 175 and note; 4 Martin N. S. (La.), 434.

La Croix v. Menard, 15 Am. Dec. 161 and note; 3 Martin N. S. 339.

Clapp & Co. v. Phillips & Co., 19 La. Annual 461; 92 Am. Dec. 545.

Kansas C. P. Ry. Co. v. Fitzgerald (Neb.), 49 N. W. 1100.

Bray v. Booker, 6 N. D. 526; 72 N. W. 933.



Smith v. Geo. T. Smith Mfg. Co., (Mich.), 77  
N. W. 308.

Yetzer v. Young, 3 N. D. 263; 52 N. W. 1054.

Murray v. American Surety Co., 70 Fed. 341;  
17 C. C. A. 138.

Pomeroy, Rem. & Rem. Rights, sec. 430.

Smith v. Gale, 144 U. S. 518; 12 Sup. Ct. 674.

Sands v. Greeley & Co., 80 Fed. 195.

(5) The Receiver, and not the general creditors, is the proper party to a suit involving general assets in his possession, and where such assets are held not to be subject to any lien existing at the time of his appointment, he is entitled to retain them for equitable distribution.

High on Receivers, sec. 200.

Stewart v. Hayden, 72 Fed. 402.

Beach, Receivers, secs. 439 to 443.

Thompson, Corporations, 2nd ed., vol. 5, sec.  
6396.

Atlantic Trust Co. v. Dana, 128 Fed. 209; 62  
C. C. A. 657.

Porter v. Sabin, 149 U. S. 473, 478; 13 Sup.  
Ct. 1008.

Doggett v. Railroad Co., 99 U. S. 72, 78; 25  
L. ed. 319.

Express Co. v. Railroad, 99 U. S. 191, 199; 25  
L. ed. 319.

Gray v. Davis, 10 Fed. Cas. 1006, 1009.

Davis v. Gray, 16 Wall. 203, 217, 219; 21 L.  
ed. 447.

Ames v. Union Pacific Ry. Co., 74 Fed. 335;  
20 C. C. A. 432.

Jones, Railroad Securities, sec. 495.

Jones, Corporate Bonds and Mortgages, 479,  
480.

Werner v. Murphy, 60 F. 769.

Calvert, Parties in Equity, pp. 20 and 21.

Bank v. Peters, 44 Fed. 13.

Hayden v. Thompson, 71 Fed. 60; 17 C. C. A.  
592.

Bailey v. Mosher, 63 Fed. 488, 491; 11 C. C.  
A. 304.

Honor v. Henning, 93 U. S. 228; 23 L. ed.  
879.

(6) Where the purpose and object of a suit is for the appointment of a chancery Receiver to marshal the assets and hold and manage the same for the preservation and protection of every interest therein, no one creditor or class can, by virtue of the appointment of such Receiver, acquire a right to defeat any other creditor or class unless such right existed prior to the appointment of the Receiver.

Haehnlen v. Drayton, 192 Fed. 300; 112 C.  
C. A. 558.

Sage v. Memphis & L. R. R. Co., 125 U. S.  
361; 8 Sup. Ct. 887; 31 L. ed. 694.

Seibert v. Minn. & St. L. Ry. Co., 52 Minn.  
246; 53 N. W. 115.

Union Trust Co. v. Illinois Midland Ry. Co.,  
et al., 117 U. S. 434; 6 Sup. Ct. 809; 29 L.  
ed. 963.

Hancock v. Wooten, 107 N. C. 9; 12 S. E. 199;  
11 L. R. A. 466.

Westinghouse Elec. & Mfg. Co. v. Idaho Rail-  
way, L. & P. Co., 228 Fed. 972.

(7) In such cases the rule is the same as the rule that formerly obtained in bankruptcy proceedings.

Under the National Bankruptcy Act, prior to the amendment of 1910 giving the trustee special rights and powers, the trustee acquired no such lien by the sequestration of the property of the debtor for the benefit of the creditors as to enable him to attack a mortgage, in the absence of actual fraud, unless he did so representing a creditor who had such a right, prior to the appointment of the trustee.

In re Economical Printing Co., 110 Fed. 514;  
49 C. C. A. 133.

In re Collins, Fed. Cas. 3007.

York Mfg. Co. v. Cassell, 201 U. S. 353; 50  
L. ed. 785.

In re Lane Lumber Co., 210 Fed. 82; affirmed  
217, f. 550.

(8) Such was also the rule under the acts of June 3, 1864, and June 30, 1876, providing for Receivers of insolvent national banks and the sequestration of the property and assets thereof for the redemption of circulating notes and the payment of the debts of the creditors. Under these acts the appointment of a Receiver in no way affected the right of any creditor or class, and the rights and equities of

all parties were fixed as of the date of the appointment of the Receiver.

Chemical National Bank v. Armstrong, 59 Fed. 372; 8 C. C. A. 155.

Commercial and Savings Bank v. Robert H. Jenks Lbr. Co., 194 Fed. 739.

(9) A secured creditor, such as the trustee in the case at bar, should in any event be permitted to share in the general assets of the insolvent debtor, at least to the extent of its deficiency.

Mercantile Trust Co. v. Southern States Land and Timber Co., 86 Fed. 711; 30 C. C. A. 349.

Westinghouse Elec. & Mfg. Co. v. Idaho Ry., L. & P. Co., 228 Fed. 972.

(10) Even if general creditors had a right under the state statutes or decisions to avoid the lien of the trustee, or if the Receiver as their representative or by virtue of the rights conferred upon him for their benefit by statutes or decisions had such a right, the assets or property of the insolvent debtor so taken from under the lien of the trust deed would be assets of the debtor Power Company and should be ratably and equitably distributed for the benefit of all its creditors.

Thompson v. Huron Lbr. Co., 4 Wash. 600; 30 Pac. 741.

Bailey v. Mosher, 63 Fed. 488.

High on Receivers, sec. 819-c, 439-b.



7 R. C. L. Corporation, sec. 765.

Thompson, Corporations (2nd ed.), sec. 6396.

Glenn, Creditors' Rights and Remedies, secs.  
314, 316, 319.

Beach, Receivers, secs. 441, 444.

Clark v. Bacorn, 116 Fed. 617; 54 C. C. A. 73.

Penn. S. Co. v. New York City Ry. Co., 198  
Fed. 721, 738; 117 C. C. A. 491.

H. K. Porter v. Boyd, 171 Fed. 305; 98 C. C.  
A. 160.

## ARGUMENT.

We have here the anomalous situation that a Court of equity, after appointing a chancery Receiver for an insolvent corporation, to marshal and administer its assets for the protection and preservation of the respective rights and equities of all its creditors, enters a decree to the effect that a certain few of the unsecured general creditors, representing but a small part of the total claims filed with the Receiver, have by virtue of the appointment of the Receiver and the filing and allowance of their claims in the Receivership suit, acquired a preference over the other creditors, and a lien upon or interest in the assets sufficient to defeat a mortgage of its priority, notwithstanding the order appointing the Receiver comprehended all creditors, both secured and unsecured.

The decision of the Court seriously affected not only the Trustee, whose mortgage the Court held could be assailed by these few creditors because of the right or lien that vested in them by virtue of the

appointment of the Receiver and because of the fact that they had filed their claims in the Receivership suit and obtained the hasty approval thereof without notice to or knowledge thereof by other creditors, but it seriously affected other creditors, for it permits these few favored creditors to obtain assets which, if not subject to the lien of the Trustee, should be administered by the Receiver in the Receivership suit for the equal and pro rata benefit of all creditors.

The Trustee has the double grievance; first, under the ruling of the Court these favored creditors became, through the appointment of the Receiver, vested with the right which they did not have when the Receiver was appointed, to attack the mortgage and remove from under the lien thereof assets to the value of \$45,000.00; and, second, the Court held that the assets so removed from the lien of the mortgage by these creditors, should be distributed to such creditors instead of being turned over to the Receiver for administration in the Receivership suit for the benefit of *all creditors*. In the latter event, the Trustee would have received its proportionate part thereof on its deficiency. The Trustee, therefore, contends, first, that the lien of its mortgage was superior to the claim of the unsecured creditors who were permitted to attack the same; second, that if it cannot hold the property under the lien of its mortgage, it should be administered in the Receivership suit for the equal and pro rata benefit of all creditors in accordance with the principles governing the distribution of assets in a general creditors' suit.

With these preliminary observations, we pass to a consideration of the legal and equitable principles governing chancery Receivers and the effect of the appointment of such Receivers upon the rights of the creditors.

## I.

*The Receiver in the case at bar is a chancery Receiver for the preservation of the interests of all parties, and he has no greater rights than those he represents, and his appointment conferred no additional rights upon any creditor or party.*

A chancery Receiver is often given special rights of representation, powers and rights in property, depending upon local statutes or decisions and upon the nature, purpose and scope of the suit in which he is appointed.

The Receiver appointed by the Court in the suit commenced by Guy I. Towle against the Power Company (Rec., 159) was appointed for the purpose of marshalling the assets of the Power Company and to hold, manage and operate the same and protect and preserve the rights and equities of all creditors and other parties in interest (Rec., 167 to 171). Clearly, such a Receiver is a general chancery Receiver not appointed for the benefit of any particular person or class, nor to impound any specific property for the satisfaction of any specific class. Such a Receiver derives his authority from the Court and not from the party or parties at whose instance he is appointed. He acts on behalf of no particular interest, but guards the rights of all. As such, he can

represent any of such interests and is clothed with their rights, but by his appointment he acquires no rights in addition to those that he represents, nor does he confer any right upon any interest represented by him. In the faithful performance of his duties, and in carrying out the purposes of his appointment, he does represent any and all litigant parties, but he neither receives nor confers any additional rights, and the rights, equities and priorities of all parties are preserved and protected by him as of the date of his appointment.

It is conceded and admitted by the general creditors, Guy I. Towle, Carl J. Hahn, Jake M. Shank, and L. M. Plumer and E. B. Scull, in their pleadings in this cause (Rec., 88, 104, 124, 138), that they were merely general creditors and that prior to the appointment of the Receiver they had acquired no lien by any process upon any of the property of the Power Company. The trial court based their right to be paid in full upon the lien acquired by virtue of the appointment of the Receiver and the filing of their claims with and the allowance thereof by such Receiver (Rec., 182 to 185).

Where a state statute or the decisions of the highest court of the state confer upon a Receiver in a certain class of cases special powers and rights in property, the general rule as to a chancery Receiver is inapplicable. And where, under the state decisions or statutes, a Receiver can avoid conveyances and encumbrances, clearly the Federal Courts will follow the local law in cases arising in those jurisdictions.



We will hereinafter in a separate proposition take up the discussion of the effect of such statutes and decisions upon the rights of a Receiver appointed in those jurisdictions, and will show that there is no statute or decision in the State of Idaho conferring upon the Receiver any greater rights, by virtue of his appointment, than those possessed by the parties whom he represents. In discussing these state decisions and statutes, we will also take up the law of Idaho and show that under the decisions and statutes of this state the lien of the Trustee could not be questioned by a general creditor or anyone not having secured a lien by contract or process upon the property of the debtor. We will, however, first discuss the general proposition as to whether or not in the Receivership suit the creditors, Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull, admittedly general unsecured creditors, acquired any greater rights by virtue of the appointment of the Receiver than they had prior thereto, or conferred upon the Receiver greater rights than those of the creditors whom he represented.

Mr. Pomeroy (*Pomeroy, Eq. Juris.*, vol. 4, sec. 1336), after setting forth the several classes of cases in which a Receiver is appointed in equity, states the general rule relative to his powers, rights and duties as follows:

“The appointment of a Receiver during the pendency of a suit does not determine any rights or title of the litigant parties; it is made for the benefit of all. His possession, though impartial,

while the controversy is undecided, is regarded as on behalf of the one who is ultimately decided to be entitled to the property."

Mr. High (High on Receivers, p. 12) says:

"And since a Receiver derives his title from the Court rather than from the act of the parties upon whose application or by whose consent he is appointed, it necessarily follows that the effect of his appointment is to place the property in his custody as an officer of the Court for the benefit of whoever may ultimately prove to be entitled thereto but without effecting any change of title to the property."

As stated above, and as appears from the record, the Receiver in the Towle suit was appointed for the preservation and protection of all interests. Where a Receiver is appointed on behalf of a mortgagee in a foreclosure suit, it has frequently been contended with much force that such a Receiver confers upon the mortgagee rights in addition to those that he had at the time of the appointment. The reasons that obtain in such cases are much stronger than in a general creditors' suit, but the Courts have generally declined to depart from the rule as stated by Pomeroy and High.

In *Central Trust Co. of New York v. Worcester Cycle Mfg. Co.*, 93 Fed. 712, 35 C. C. A. 547, a Receiver had been appointed on behalf of a mortgagee in a foreclosure suit, and it was contended that the Receiver, having been appointed on behalf of the

mortgagee, such appointment was a sufficient possession by the mortgagee to cure and perfect his rights under a mortgage, which under the law of the state would become valid where such possession was taken prior to the intervention of other claims.

The Circuit Court of Appeals clearly held that the rights of all parties were fixed as of the time that the Receiver was appointed, and such appointment could not be held to change or add to the rights of any party, saying:

“The property is taken by the Court, and is put into the hands of its officer to hold for the benefit of ‘whom it may concern’. He holds and manages it for the benefit of the party to whom the Court may ultimately decide that it belongs, *but it would be a perversion of the whole theory of custodia legis if the mere appointment of a Receiver were itself determinative of that ‘ultimate decision’*. The proposition here contended for is an instance of reasoning in a circle. Conceding the soundness of the conclusion expressed ante—that as to the personal property the description was imperfect, and the mortgage therefore fraudulent as to creditors, the appellant’s argument may be thus stated: ‘I cannot show myself to be ultimately entitled to the property unless I can prove a mortgage superior to the rights of creditors. The mortgage I have proved is void as to creditors unless I can show that I have taken possession. The possession of the Receiver must be considered to be my possession

only because I am ultimately held to be entitled to the property, but the reason why I am ultimately held to be entitled to the property is the very assumption that the Receiver's possession is my possession.' The property is put into the hands of the Receiver only to preserve it from harm, to secure its accretions, and to insure its delivery unimpaired to the successful litigant, *but the custody of the Receiver should not be held to make any change in the status of any litigant's title.* In the case at bar, so far as the personal property is concerned, it cannot be said that the mortgagee is the successful litigant. The creditors, in the person of their trustee, Goodrich, who has been made a party litigant, have prevailed, since they have shown that, down to the time the Court seized the property, nothing which mortgagor and mortgagee had done had operated to impair their rights to proceed against the *res*. *If the mortgage were fraudulent as against creditors then, it remains fraudulent, although an officer of the Court has taken charge of it temporarily."* (Our italics.)

The reasoning of the Court is certainly both logical and cogent. If the mortgage was fraudulent so that under the statutes and decisions of the state in which the case arose, the creditors at the time the Receiver was appointed could have set the same aside, then the mere appointment of the Receiver does not deprive them of their right. For instance, if under the laws



of Idaho, general creditors could avoid an unrecorded chattel mortgage and had such a right at the time the Receiver was appointed, clearly the Receiver could not deprive them of that right, and as the representative of all interests the Receiver could on behalf of such general creditors avoid the unrecorded instrument.

The Court in the Central Trust Co. v. Worcester Cycle Mfg. Co. case in support of the general principle stated above, quotes the following authorities:

“The effect of the appointment of a Receiver of mortgaged premises *is not to oust any party of his right* to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and, when the party entitled to the estate has been ascertained, the Receiver will be considered his Receiver.” (Our italics.) Wiswall v. Sampson, 14 How. 52.

“He is an officer of the Court. His appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in *custodia legis* for whoever can make out a title to it. It is the Court itself which has the care of the property in dispute.” Booth v. Clark, 17 How. 322.

“A Receiver derives his authority from the act of the Court, and not from the act of the parties at whose suggestion or by whose consent he is

appointed, and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court, for the benefit of the party ultimately proved to be entitled, *but not to change the title, or even the right of possession, in the property.*" (Our italics.) *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013.

The same question arose in a different manner in *Central Appalachian Co. v. Buchanan*, 33 C. C. A. 107; 90 Fed. 454. The specific question was whether the appointment of a Receiver at the instance of a judgment creditor affected in any way the right to an equitable set-off which the creditor had as against the debtor prior to the appointment of the Receiver. The Circuit Court of Appeals for the Sixth Circuit, consisting of Judges Taft, Lurton and Clark, said:

"It is urged that this right of set-off cannot be asserted against a judgment in favor of a Receiver of the warrantor. The record in which Buchanan was appointed Receiver is not filed. We must assume that he was appointed under the *usual proceeding by creditors against an insolvent business corporation, and that no priority was sought or acquired.* This is in accord with the averments of the cross-bill touching this appointment, which in substance are that he was appointed for the purpose of holding possession of the assets of the company, and of collecting its debts, and that his suit was for rents, which accrued to the Southern Land & Improvement Co. as lessor,

under a contract with the Central Appalachian Company as lessee, and that 'his recovery was alone in right of that company', and in pursuance of an order that he should 'collect all demands which were due or should become due' to said company. *Such an appointment does not change the title or impose any lien upon the property in possession of the Receiver.* He is a mere custodian of the Court, holding and protecting the property to await its ultimate disposition by the Court, according as the right might appear. *No right of priority is ordinarily fixed by such appointment. It cuts off the right to acquire liens, but imposes none by virtue of the step alone.* (Our italics.) Railroad Co. v. Humphries, 145 U. S. 82, 12 Sup. Ct. 787; Union Bank v. Kansas City Bank, 136 U. S. 223, 236, 10 Sup. Ct. 1013; New York P. & O. R. Co. v. New York, L. E. & W. R. Co., 58 Fed. 268, 278, High, Rec., sec. 5."

Here was clearly a case where a Receiver had been appointed at the instance of a creditor, and no local statute or decision affected the Court's ruling; the rights and priorities of all parties were fixed as of the date of the appointment of the Receiver, and no priority or preference was acquired by such appointment. The rule is clear that such appointment cuts off the right to acquire liens but imposes none by virtue of that step alone. But if any of the parties represented by the Receiver had a right, at the time of the appointment, to avoid or set aside a conveyance,

then clearly such creditor is not deprived of his right, and the Receiver may enforce it for him.

That the appointment of a Receiver like the one involved in this case does not constitute a sequestration or impounding of certain assets for the benefit of a particular person or class appears from the decision in *Quincy M. & P. R. Co. v. Humphries*, 145 U. S. 582, 36 L. ed. 632. The specific question was as to whether the Receiver was committed to pay rents under a lease. Mr. Justice Fuller, in stating the facts, says:

“The company was insolvent. Its preferential indebtedness amounted to nearly four and one-half millions; its credit was gone and many parts of the property were in wretched condition. The bill was obviously framed upon the theory that an insolvent railroad corporation has a standing in a Court of equity to surrender its property into the custody of the Court to be preserved and disposed of according to the rights of its various creditors and in the meantime operated in the public interest. *The relief sought was predicated upon the view that those rights were not changed by the application and that the proceeding was in the interest of each and all of them as such interest might appear.*” (Our italics.)

The Court denied the right to collect the rents due on the lease from the Receiver, saying:

“But the Receivers were not statutory Receivers, nor did they occupy identically the same position as assignees in bankruptcy or insolvency and



the like. \* \* \* \* \* The ordinary chancery Receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the Court; and, by special authority, may become an officer of the Court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the Court, under which the Receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that, as he would hold any other personal property involved, for and as the hand of the Court, and not as assignee of the term."

In *Kneeland v. American Loan and Trust Co. of Boston*, 136 U. S. 89, 34 L. ed. 379, the question arose as to priority of certain rentals, the Court, speaking generally of the powers of Receivers, said:

"Upon these facts, we remark, first, that the appointment of a Receiver vests in the Court no absolute control over the property, *and no general authority to displace vested contract liens*. Because in a few specified and limited cases this Court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a Court appointing a Receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a Court appointing a Receiver could rightfully burden the mortgaged property

for the payment of any unsecured indebtedness. Indeed, we are advised that some Courts have made the appointment of a Receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the Court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot."

The Circuit Court, Judges Lurton, Taft and Ricks sitting, in the case of N. Y. P. & O. R. Co. v. N. Y. L. E. & W. R. Co., 58 Fed. 268, speaking of the effect of the appointment of Receivers upon the interests procuring the appointment, quoted Chief Justice Waite as follows:

"The possession taken by the Receiver is only that of the Court, whose officer he is, and adds nothing to the previously existing title of the mortgages. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, *and in the meantime the Court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.*" (Our italics.)

and added thereto the following:

"A Receiver represents no particular interest or class of interests. He holds for the benefit of

all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees to not define or determine the character of a Receiver's possession or its effect upon the rights of those interested in the property in their possession. *Receivers ought not to be appointed to represent the peculiar interests of one class, and, a fortiori, they should not be appointed to represent one interest out of a class of interests.*" (Our italics.)

In *Meyer v. Western Car Co.*, 122 U. S. 1, 26 L. ed. 59, a case arising from Iowa, the specific question was whether certain creditors, who, upon the filing of their bill to foreclose a mortgage, had acquired a lien or special interest in certain property by virtue of the appointment of a Receiver, sufficient under the local law to entitle them to contest the lien created by a conditional sale, which is the identical question that arises in the case at bar; and the Court, speaking through Mr. Justice Waite, said:

"This leaves no doubt, and clearly confines the operation of the text to such creditors as have by suit perfected a right to impeach the transaction. Such has always been the rule in respect to conveyances made to hinder and delay creditors. Until such suit was commenced, the parties were at liberty to deal as they pleased with the property conveyed, and the rights of creditors were determined by the condition in which the property

was when they interfered. It is clear, therefore, that these appellants, as creditors at large, had acquired no such special interest in the property, when their bill to foreclose their mortgage was filed, as would give them the right to contest the validity of the Car Company's title. *As against them, in the condition they were, the lien created by the conditional sale was, to all intents and purposes, valid and subsisting when the Receiver, on his appointment, took possession of the property; and this possession, as we said in Fosdick v. Schall, was for the benefit of whomsoever in the end it should be found to concern. The rights of the parties were fixed at the moment the property was taken by the Court through its Receiver into its own possession. At that time these appellants were not either execution or attaching creditors.*" (Our italics.)

In *Ames v. U. P. Ry. Co.*, 20 C. C. A. 432, 74 Fed. 332, speaking generally of the status of Receivers, the Court said:

"Do receivers of an insolvent corporation, appointed at the suit of stockholders or creditors, stand in the shoes of the insolvent corporation, or in the shoes of the complainants in the suit? Have such receivers no higher right or greater power to charge the trust estate in their hands with the current liabilities which they incur in its administration than the insolvent corporation or the complainants in the suit, at whose instance or for whose benefit they were appointed, would



have had if they were operating the property? An affirmative answer to these questions is indispensable to the maintenance of this argument. We had occasion to consider them early in the administration of these trusts, and our conclusion was thus expressed:

“ ‘It is well settled that the receivers of an insolvent railroad corporation, appointed by a Court of chancery, to preserve its property and operate its railroads, do not stand in the shoes of the corporation. They are neither the representatives of the insolvent corporation, nor of its creditors or stockholders. They are the officers and representatives of the Court, the hands of the Court, in which it holds the property which it operates the railroads of the insolvent corporation for the benefit of those ultimately entitled to the property and the income.’ *Ames v. Railway Co.*, 60 Fed. 966, 969.

“ ‘In *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, the Supreme Court said:

“ ‘A receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed.’ *Railroad Co. v. Humphreys*, 145 U. S. 82, 97; 12 Sup. Ct. 787.

“ ‘These five receivers, then, were the custodians of the property of each of these corporations, the mere ministerial officers of the Court, charged with the duty of preserving and operating the

railroads of each of these corporations, for the *benefit of those who should ultimately be adjudged to be entitled to the income they derived and the proceeds of the property they sold.* The corporations to which the various properties belonged were insolvent. They were unable to discharge their duties to the public—their duties of maintaining and operating these railroads. They were unable to discharge their duties to private citizens—their duties of performing their contracts and paying their debts. The receivers were, therefore, neither bound by the contracts nor limited by the contractual relations of these corporations. They stood not in the shoes of the corporations nor of the complainants in the suit, but they stood in the place of the Court. They were the hands of the Court, preserving and operating the properties in their charge under its direction.” (Our italics.)

The statement that the status of the property and all interests are preserved as of the date of the appointment of the Receiver is merely another way of saying that by virtue of such appointment nothing is added to the title of any party.

In *Commonwealth Roofing Co. v. North American, etc., Co.*, 68 C. C. A. 418, 135 Fed. 984, the Court, in discussing the rights of a creditor in reference to liens existing at the time of the appointment of the Receiver, said:

“In the present case, notwithstanding leave had been given to proceed by writ of attachment,

the Circuit Court, as we have already said, properly took jurisdiction of, and passed upon, the claims of the appellant. How can it be deemed necessary that, in order that a lien existing when a receiver is appointed should be satisfied, proceedings should be taken by writ of attachment, when, after all, the Court which appoints the receiver has the power to treat such proceedings as futile? This question is answered by the broad rule which we have stated. *The just conclusion is that, when a receiver of specific property has been appointed by a Court having competent jurisdiction, the status of the property and all interests are preserved as of the date of the appointment, subject to a disposition of all the same by the chancellor on due and seasonable application in reference thereto.*" (Our italics.)

In the case of Mercantile Trust Co. v. Southern Lands and Timber Co., 30 C. C. A. 349, 86 Fed. 711, the question arising as to whether the status of the rights of the parties were fixed as of the date of the appointment of the Receiver, the Court said:

"We believe it has been the uniform practice in this circuit for more than 20 years, in conducting administrations of this kind, to recognize the liens as they existed at the institution of the suit. It would, in our opinion, *impede and embarrass the proceedings of such an administration, discredit the Court, and do despite to the rule of equality in which equity delights, to suffer such*

*a claim for preference as is made by the interveners here to prevail.* We therefore hold that the interveners did not, by putting their claims in judgment, acquire any better right than they had at the institution of this suit. We believe that this holding is in accordance with all the more recent and better considered of the adjudged cases bearing on the questions involved. *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, and the cases therein cited.” (Our italics.)

And the same Court, referring to the status and rights of a Receiver, said:

“A court of equity, at the instance of the proper parties, will then make those funds trust funds, which in other circumstances is as much the absolute right of the corporation as any man’s property is his. This cannot better be done or be better evidenced than by seizing the property; and, when a Court does take into its possession the assets of an insolvent corporation, it will administer these assets on the theory that they in equity belong, first, to the creditors; and, if there is more than sufficient to satisfy the creditors, then to the stockholders rather than to the corporation itself. There are degrees of insolvency, and it does not necessarily reach that extremity which excludes stockholders before this jurisdiction in equity supervenes. *The chief object and duty of a court of equity in taking possession of an*



*insolvent estate is to preserve it and secure its distribution among the creditors, according to their rights therein at the time of taking it into possession, or (where these are not simultaneous) at the institution of proceedings to that end."*  
(Our italics.)

If, then, the rights of a creditor and of all parties are fixed as of the time of the Receiver's appointment, and no one creditor by putting his claim in judgment can secure a preference as against another creditor, whether that creditor be secured or unsecured, then it necessarily follows that, unless there is some local statute or decision giving him or the receiver such rights or interests in the property as will enable him to defeat the right of another creditor, the rights of all creditors must be measured and determined as of the date of the appointment of the receiver. We submit that the authorities uniformly hold that neither the appointment of a receiver, nor the allowance of the claim by the receiver, nor the obtaining of a judgment in another court will give one creditor a preference over another, in the absence of local law giving such preference.

Thus, in Savings and Trust Co. of Cleveland against Bear Valley Irrigation Co., 93 Fed. 339, Circuit Judge Ross said:

"The Spreckels Bros. Commercial Company, therefore, has not acquired any judgment lien upon any of the realty covered by the mortgage or receivers' certificate upon which the bill is

based, and has only a personal judgment against the Bear Valley Irrigation Company. *Savings & Trust Co. v. Bear Valley Irr. Co.*, 89 Fed. 32. 'And the same reasons, or reasons equally strong as those which have settled the question that a judgment subsequently acquired in another Court, or in the same Court in another suit, does not create a legal lien on any of the property being administered, exclude the holder from acquiring thereby an equitable lien or right of preference in the assets.' *Mercantile Trust Co. v. Southern States Land & Timber Co.*, 30 C. C. A. 359, 86 Fed. 711, 721; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788."

And the Circuit Court of Appeals for the Ninth Circuit, in *Clark v. Bacorn*, 54 C. C. A. 73, 116 Fed. 617, in discussing the same general principle, said:

"The specifications of error present the single question whether the facts alleged in appellants' bill of complaint constitute such a cause of action as would entitle them to the equitable relief sought; in other words, have the appellants a lien upon the property or funds in the hands of the receiver, Bacorn, superior to that of other creditors? We think this question must be answered in the negative. *It is well settled that when a corporation becomes insolvent, and the corporate assets have passed into the hands of a receiver, such assets constitute a fund for ratable*

*distribution among its creditors; and no creditor can, by suit commenced or judgment recovered after the commencement of the proceedings to secure the appointment of a receiver, secure a lien upon the corporate assets that will entitle such creditor to priority of payment.* Thompson, in sec. 7060 of his work on Corporations, states the reason for this rule to be that ‘the proceeding in which the receiver is appointed is a judicial assignment of the property of the insolvent for a ratable distribution, and no creditors are allowed, therefore, by any act subsequently done, to get liens or preferences in respect to it.’ *It would, indeed, seem anomalous that a lien adverse to the rights of the receiver could be obtained, and thus interfere with one of the objects of his appointment in the control of the distribution of the assets.*” (Our italics.)

In the case at bar not only did the trial court permit certain general creditors to contest the lien of a secured creditor by virtue of the rights they acquired by the appointment of the receiver, but the Court also permitted such general creditors to set up a claim and lien adverse and superior to the rights of the receiver, and it based such rights upon the appointment of such receiver.

The trial court in its decision (Rec., 181, 182) says:

“By intervening creditors and the Receiver it is urged that as to the personal property which the instrument purports to cover it is void.”

The Receiver prayed that only so much of the property as the Court should find to be covered by the lien of the Trustee should be sold and that the Receiver be given all proper relief. (Rec., 87.) Surely, it cannot be denied that the Receiver as the representative of all parties in the Receivership Suit represented the unsecured general creditors as well as secured creditors.

In *Atlantic Trust Co. v. Dana*, 62 C. C. A. 657, 128 Fed. 209, the Court, speaking of the effect of a decree against a receiver as to the rights of the creditors, said:

“The creditors, Dana and Whiting, were not actual parties to the Strong suit, but they were *represented by the receiver, and are as much bound by the decree as he is*. They were what are sometimes termed *quasi parties*. Upon the appointment of the receiver the right to enforce the payment of hydrants’ rental and other rights in action due to the water company, or becoming due during the continuance of the receivership, vested in the receiver, and *he became the proper party to prosecute all necessary suits for that purpose, and to defend such suits as should be commenced for the purpose of establishing claims against or rights to the property of the water company*. *Porter v. Sabin*, 149 U. S. 473, 478, 13 Sup. Ct. 1008, 37 L. ed. 815; *Doggett v. Railroad Co.*, 99 U. S. 72, 78, 25 L. ed. 301; *Express Co. v. Railroad*, 99 U. S. 191, 199, 25 L. ed. 319; *Gray v. Davis*, 10 Fed. Cas. 1006, 1009; *Davis v.*



Gray, 16 Wall. 203, 217, 219, 21 L. ed. 447; High on Receivers (3rd ed.), sec. 316. In such suits, whether brought by the receiver or against him, it is not necessary, and generally is not even proper, to join creditors of the debtor company with the receiver as parties. *Doggett v. Railroad Co., Express Co. v. Railroad Co., Gray v. Davis, supra.* *The receiver is the representative of the Court and of all the parties in interest, and can neither surrender to others nor divide with them the management of the prosecution or defense of such suits or the responsibility therefor.* *Doggett v. Railroad Co., Express Co. v. Railroad Co., Porter v. Sabin*, 149 U. S. 479, 13 Sup. Ct. 1008, 37 L. ed. 815; *Gray v. Davis, supra*; *Ames v. U. P. Ry. Co., supra*; High on Receivers (3rd ed.), secs. 134, 135, 650; Jones on Railroad Securities, sec. 495. Where it is necessary to apply for and obtain leave of Court to sue a receiver in his official capacity, 'it is not essential to the jurisdiction of the Court over the receiver, or to the validity of the order, that the application should be based upon notice to the parties in the action wherein the receiver was appointed. It is sufficient that leave be granted by the Court having control over the receiver, upon notice to him, against whom alone the cause of action exists, and against whom the proceedings must be brought.' High on Receivers (3rd ed.), sec. 265; *Porter v. Bunnell*, 20 O. St., 150, 158; *Farwell v. Great Western Railroad Co.*, 161

Ill. 522, 618, 44 N. E. 891. The principle underlying the several cases bearing upon the representative character of a receiver is well shown in *Gray v. Davis, supra*. It was a case wherein a receiver appointed in a railroad foreclosure suit filed a bill against officers of the State of Texas to enjoin them from taking certain action calculated to impair property interests of the railroad company in the charge of the receiver, and held by him for the benefit of the creditors of the company. A demurrer was interposed upon the ground that the creditors to be affected were not made parties to the bill. The demurrer was overruled, the circuit judge saying:

“ ‘The creditors are neither necessary nor proper parties, because they are represented by the complainant who is receiver.’ *Gray v. Davis*, 10 Fed. Cas. 1009. This ruling was affirmed in the Supreme Court, where it was stated:

“ ‘*A receiver was appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the Court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in*

the possession of either the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. *Davis v. Gray*, 16 Wall. 217, 27 L. ed. 447. (Our italics.)

Clearly, then, if the creditors, whether secured or unsecured, acquired no rights by the appointment of the receiver, and if their respective rights and priorities were fixed as of that date and they could not thereafter acquire a lien or preference so as to defeat the rights of any other creditor represented by the Receiver, surely, *a fortiori*, they could not set up a claim or lien *superior and paramount to that of the Receiver*; and if the Receiver, as the representative of all the creditors of the Power Company, could have contested the claim of the Trustee for and on behalf of creditors who had a right to avoid any conveyance or encumbrance, or who had a right to defeat the claim of any other creditor at the time of the appointment of the Receiver, was held by the Court in this case not to have such a right or interest as would defeat the lien of the Trustee as to certain personalty, then how can it be said that some of the creditors represented by the same Receiver, who admittedly had no such right prior to the appointment of the Receiver, have by virtue of such appointment acquired such a right?

Mr. High (High on Receivers, sec. 456), in discussing the right of representation of a receiver, says:

“The functions and powers of the receiver as regards rights of action to set aside fraudulent

transfers made by the debtor being limited to such rights of action as the judgment creditor might himself have maintained, *he cannot effect a result which the creditor himself could not have effected*; hence he stands in the place of the judgment creditor and is limited by any acts or conduct on his part which would have barred proceedings by the creditor himself. And when the creditor is estopped by his own act from proceeding against the debtor or his assignee to set aside a fraudulent assignment of the debtor's property, such estoppel applies equally as against the receiver appointed in aid of such creditor."

If the creditors for whose protection the Receiver was appointed had the right to defeat the lien of the Trustee, then there is no question but that the Receiver could on behalf of such creditors defeat such lien. But, as in the case of estoppel, where the creditors that he represents had no such right at the time of the appointment of the Receiver, the Receiver has no greater rights than the parties whom he represents.

The question as to what interest in the assets of a corporation was acquired by the parties represented by a receiver upon his appointment arose in *Shaffer v. McCulloch* (C. C. A., 7th circuit), 192 Fed. 801. A receiver had been appointed at the instance of a creditor for the purpose of equitably distributing all the assets of the debtor corporation and for the preservation and protection of the rights of all creditors. A preferred stockholder intervened, setting



up his claim. Later the claim of the creditor who had applied for a receiver was purchased by Shaffer, who thereupon applied to the Court that the receiver be discharged, setting forth that the debtor was now solvent. To such a discharge the intervener objected, claiming an interest in the trust fund which could not be divested without his consent. The Court said:

“Assuming the Court’s premise—that the appointment of a receiver under the circumstances named, vested McCulloch as a preferred stockholder with an interest in the trust fund of which nothing could divest him except his own consent—the Court was right in entering the decree notwithstanding the motions of the creditors.

“But does this correctly define McCulloch’s relation to the so-called trust fund? Does the bringing of such a creditors’ suit and the appointment of a receiver, determining for the time being that the corporation is insolvent, become a judicial determination so final that the status is not ended, except by consent of the stockholders, one and all, as well as the creditors? Is the trust fund character impressed upon the assets of a receiver so irrevocable, that notwithstanding to proceed to finally wind up the corporation and distribute its assets would be an injury to its interests as an entirety, and notwithstanding those who initiated the movement and all who joined in it as creditors are willing that the proceedings should be recalled on terms that would do none of the interests injury, the Court has no authority to do

other than to go on to final distribution? Cannot creditors who have thrown a growing concern into chancery, a concern depending like this one upon its being a going concern, for its chief value, repent their conduct and thereupon permit it to be taken out of chancery? Upon these questions we are left without any serious doubt. They answer themselves. To answer them the way the Court below has answered them would be to forbid a court of chancery from giving, at any time, a helping hand, except at the risk, which the Court itself could not avoid, of making it a hand that an indignant stockholder may successfully lay hold of to blight and destroy.

“There is nothing in the cases cited that establishes the view taken. None of them involve, even remotely, the question involved. What is said in each of them (as quoted) about the assets of insolvent corporations being trust funds is consistent with the power of creditors who have put a corporation into chancery to consent that it be taken out again—the terms being a matter for each individual case as it arises. Whatever uncertainty is raised by these quotations is not in the doctrine, but in the application of the doctrine. And the one expression, in all cases, that most nearly applies the doctrine to the case in hand is that of Justice Brewer in *Hollins v. Brierfield Coal and Iron Company*, *infra*, wherein, after reviewing all these cases, and stating the doctrine in general terms, he continues:

“ ‘It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.’

“That sentence seems to us to exactly express the application of the doctrine to the case before us. From the moment the bill was filed and the receiver was appointed, *the assets of the corporation became a trust in the ‘administration’ of the property. That does not mean that the stockholders acquired a relation to the property they did not have before; it means that they may insist that while the administration continues the assets shall be treated as trust funds, and if distribution takes place, shall be distributed as trust funds. By the appointment of a receiver McCulloch acquired no rights upon the property he did not have before; what he acquired was that whatever equities he had should be taken care of in the administration of the property. The trust attaches to the ‘administration’ of the property, and is raised and ceased whenever the administration of the property ceases.*” (Our italics.)

Both Courts and text writers have frequently expressed themselves in general terms that may convey a broader application than was intended. The doctrine that runs through all the cases is that the property in the hands of the Receiver is in a sense a sequestration for the benefit of all parties represented

by the Receiver; as against the corporation, it is a trust fund for the benefit of creditors, but as J. Grosscup says in the case last cited, this does not mean that any one acquired a relation to the property they did not have before the appointment; that the only rights that any creditor acquires by virtue of such appointment is that whatever equities he had at the time of the appointment of the receiver shall be protected and observed in the administration of the property; that the trust attaches to the administration of the property and is raised and ceases whenever the administration of the property ceases.

We pass now to a consideration of the effect of the local statutes upon the rights and powers of general chancery receivers.

## II.

*In Idaho a chattel mortgage, unrecorded and unaccompanied by the affidavit of good faith required by statute is valid as to the parties and as to all creditors excepting those having a lien upon the property by attachment or some process, and there are neither statutory provisions nor decisions in the State of Idaho giving either a receiver representing general creditors or such general creditors by virtue of the appointment of a receiver a lien sufficient to contest such a chattel mortgage.*

The decisions of State and Federal Courts from jurisdictions where the local statutes modify the rules as to chancery receivers, have no application here, but we will discuss them inasmuch as the trial



court has endeavored to support its decision by such citations.

A question similar to the one involved here arose in Ohio in the case of *Hamilton v. David C. Beggs Co.*, 179 Fed. 949. The Court said:

*"In Ohio the relation which a receiver bears to property given into his possession is so similar to that sustained by the assignee of an insolvent debtor, that, if the property covered by an unfiled chattel mortgage passes into the hands of a receiver, the lien of the mortgage is lost, and the rights of the creditors are the same as if the mortgagor had made an assignment in trust for their benefit. The reason for this is found in the Ohio doctrine that the receiver's appointment 'is an equitable remedy, bearing the same relation to courts of equity that proceedings in attachment bear to courts of law; the appointment being treated as an equitable execution. The purpose is to secure means for satisfying the final order and judgment of the Court in the action, and the effect of the seizure is to place the property seized in the custody of the Court. Railroad Co. v. Sloan, 31 Ohio St. 1'; Chency v. Maumee Cycle Co., 64 Ohio St., 205, 60 N. E. 207. The word 'creditors', used in the statute requiring the filing of contracts of conditional sale, refers to the same class as the word 'creditors' found in the chattel mortgage act, and consequently the former act renders the unfiled contract void as to the same class of creditors as is mentioned in the*

latter act. *York Mfg. Co. v. Cassell, supra*; *Dolle v. Cassell*, 135 Fed. 52, 67 C. C. A. 526. It follows, therefore, that if the property of a vendee, held under an unfiled contract of conditional sale, has passed into the hands of a receiver, and if no specific lien has been fastened on it, it is to be administered for the benefit of the vendee's creditors, *unless the federal rule as to the status of receivers and of property involved in a receivership necessitates a different conclusion*. That rule is that

“ ‘The possession of the receiver is only that of the Court, whose officer he is, and adds nothing to the previously existing title of the mortgagee. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the Court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.’ *Fosdick v. Schall*, 99 U. S. 235, 251, 25 L. ed. 339; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 297, 10 Sup. Ct., 1019; 34 L. ed. 408; *White v. Ewing*, 159 U. S. 36, 39, 15 Sup. Ct. 1018, 40 L. ed. 67.” (Our italics.)

No case that has come to our attention more clearly distinguishes the cases arising under local statutes and decisions giving certain powers and rights in property to receivers from the customary rule in Federal equity courts. Clearly where there are such decisions and statutes in a state, the federal courts

will follow them. The Court, continuing, quotes as follows:

“Sec. 721, Rev. Stats. U. S. (U. S. Comp. St. 1901, p. 581), provides that:

“ ‘The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.’

“In *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. ed. 975, it was said that:

“ ‘Where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the state, by which is meant those rules governing the descent, transfer or sale of property, and the rules which affect the title and the possession thereto, they are to be treated as laws of that state by the federal courts.’

“The law of a state, therefore, is to be found, not only in its statutes, but also in the course of decisions, if there be such, rendered by its highest courts in reference to a given subject-matter, which have become rules of property.

“Federal courts will, in actions at common law, on causes of action not created by federal statutes, follow the recording acts and statutes relating to chattel mortgages, conditional sales, and insolvents’ assignments, so far as they are affect-

ed by the bankruptcy act. Foster's Fed. Prac. (4th ed.), sec. 375. In *Etheridge v. Sperry*, 139 U. S. 276, 277, 11 Sup. Ct. 569, 35 L. ed. 171, Mr. Justice Brewer defined the attitude of federal courts as to chattel mortgage laws as follows:

“ ‘The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property, are primarily, at least, a matter of state regulation. We are aware that there is a great diversity in the rulings on this question by the courts in the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this Court will accept the settled law of each state as decisive in respect to any case arising therein. *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013.’ ”

The foregoing seems directly in point. Granting that the deed of trust and supplemental mortgages in this case were not filed or executed as provided by sec. 3408 of the Revised Codes of Idaho, who could raise valid objections thereto under the laws of Idaho? And are there any statutes or decisions in this



state granting a receiver any greater rights than the creditors had, or granting such creditors any additional rights by virtue of the appointment?

Sec. 3408 of the Rev. Codes of Idaho is as follows:

“A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless:

“First. It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.

“Second. It is acknowledged or proven, as grants of real estate, and the mortgage, or a true copy thereof, is filed for record with the county recorder of the county where such property is located and kept.”

The mortgages here in question had been recorded in the mortgage records of each county in which the property was situated but they had not been filed as chattel mortgages. As stated heretofore, the creditors Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull, are admittedly general creditors. There is nothing in any statute or decision in the State of Idaho to the effect that such general creditors acquired any greater rights by virtue of the appointment of a receiver than they had at the date of his appointment. In construing the above statute, the highest court of this state has repeatedly held that a general creditor, such as the creditors above named, can not contest or attack a

chattel mortgage not filed or executed in accordance with such statute.

In *Neustadter Bros. v. Doust*, 13 Ida. 617, the plaintiff sought to restrain the sheriff from selling property secured by a chattel mortgage and endeavored to resist the foreclosure of such mortgage. The Court held that the plaintiff as a general creditor had no such interest as to entitle him to resist the foreclosure of the mortgage. The Court says:

“The question arises as to whether a general creditor who has no lien upon the property either by contract or by judgment, and who in no way connects himself with an interest in the property by lien or attachment, is an ‘interested party’ within the meaning of the statute.”

The statute referred to is sec. 3418, Rev. Codes, which reads as follows:

“The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which an injunction may issue if necessary.”

The Court continues:

“The courts seem to have quite generally held that such a general creditor is not an interested party. It was held in an opinion by Mr. Justice Field of California in the case of *Horn v. Volcano Water Co.*, 13 Cal. 63, 73 Am. Dec. 569, that in order for a person to be an ‘interested party’ so as to entitle him to intervene under a statute which authorizes ‘interested persons’ to inter-

vene, that his interest 'must be that created by a claim to the demand, or some part thereof, which is the subject of litigation. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit.' The foregoing case seems to have been frequently cited and followed, as will be seen from 1 Cal. Notes 578.

"In *Howe v. Cochran*, 47 Minn. 403, 50 N. W. 368, the Supreme Court of Minnesota, in considering the right of a general creditor to contest the validity of a chattel mortgage, said: 'The defendants were not in position to question the bona fides of the mortgage to the plaintiff. It is only a subsequent purchaser or mortgagee or a creditor who has laid hold of the mortgaged property by legal process who on that ground can object that the mortgage is invalid.'

"In *Peoples Savings Bank v. Bates*, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679, a case that was taken up from the State of Michigan to the Supreme Court, it is said: 'A creditor at large cannot attack a chattel mortgage as fraudulent until he has obtained judgment, execution or some legal process against the mortgaged property.' The Supreme Court cites and reviews a number of cases in support of this position."

In *Ryan v. Rogers*, 14 Ida. 309, the Supreme Court quotes *Neustetter Bros. v. Doust* with approval, saying: "In this case the mortgagee took possession of the remaining property covered by the mortgage prior to any creditors' rights initiated by reason of

an attachment, lien or other incumbrance on the property, whereby a general creditor could bring himself within the purview of the statute and acquire a right to contest a mortgage.”

In *Martin v. Halloway*, 16 Ida. 513, the Supreme Court again cites *Neustetter Bros. v. Doust*, as well as *Ryan v. Rogers*, saying: “Possession of the remaining mortgaged property having been taken by the mortgagee prior to the rights of any creditor attaching thereto, the mortgagee would be exempt from the application of the general rule. \* \* \* We believe the rule announced in this case (43 Wis. 116) is correct, and that where a chattel mortgage is valid between the parties, even though for some reason it be void as to creditors, yet if the property be delivered to the mortgagee prior to the time any specific right or lien upon the property is acquired by a creditor, the possession of such mortgagee is valid and may be maintained and the property sold under the provisions of such mortgage.”

The trial court, in direct violation of the rule established by the decisions of the Supreme Court of the state, permitted certain general creditors who had acquired neither a lien nor any specific interest by process or otherwise upon the mortgaged property to intervene and contest the lien of the Trustee. In view of the cases heretofore cited, if any one had the right to contest the mortgage, it was the Receiver; and he was a party to the suit. Yet the Court, holding that the Receiver had no such right, permitted certain general creditors who had filed their



claims in the creditors' suit and represented by that Receiver, to intervene and contest the lien of the Trustee. As we have seen, under the laws and decisions of the State of Idaho, the Receiver by virtue of his appointment acquired no such relation to the property of the Power Company that he could contest conveyances and incumbrances which the creditors, whom he represented, prior to his appointment had no right to contest.

Innumerable cases under statutes identical with that of Idaho can be cited to the effect that in order to intervene in a foreclosure suit the intervener must be more than a mere contract or general creditor.

In *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569, the Court said:

"The petition of the creditor Rawle does not disclose any right on his part to intervene; it shows that he was a simple contract creditor, holding obligations against the company; but it does not show that any portion of them was secured by any lien upon the mortgaged premises. His intervention is only an attempt of one creditor to prevent another creditor obtaining judgment against the common debtor—a proceeding which can find no support, either in principle or authority. The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter of litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. \* \* \* \*

“The petition of Shaffer and others stands upon a different footing. It shows that they were judgment creditors having liens, by their several judgments, upon the mortgaged premises, at the time of the institution of the present suit. As such, they were subsequent incumbrancers and necessary parties to a complete adjustment of all interests in the mortgaged premises, though not indispensable parties to a decree determining the rights of the other parties as between themselves. For such adjustment the Court would have been justified in ordering them to be brought in, either upon their own petition, as in the present case, or by an amendment to the complaint. *Sargent v. Wilson*, 5 Cal. 504; *Moss v. Warner*, 10 Id. 296; *Montgomery v. Tutt*, 11 Id. 307.”

Also see note in the annotations citing numerous authorities.

In *Thompson v. Huron Lbr. Co.*, (Wash.), 30 Pac. 741, the trustee endeavored to foreclose upon a mortgage and a receiver had been appointed and the corporation declared insolvent. The lower court allowed several unsecured general creditors to intervene and contest the mortgage. In this case, such simple contract creditors had a right to contest the mortgage under the local law relative to hindering, preferring and delaying creditors. The statute in Washington is similar to that of Idaho as to intervention, and the Court, however, held that such creditors had no right to intervene, saying as follows:

“Numerous other creditors of the Huron Lumber Company, who had not obtained judgments and had no liens, and were simple contract creditors, were allowed to file so-called interventions, and the cause was then kept waiting until they could sue at law and obtain judgments, when they came in again and filed supplemental complaints. This, under the statute and the authorities, was wholly irregular. Under a statute exactly like ours, the Supreme Court of California, in the leading case of *Horn v. Volcano*, 13 Cal. 62, held that a simple contract creditor of a common debtor could not intervene in a foreclosure suit. Our statute also provides that no intervention shall be cause for delay in the trial of an action between the original parties. Sec. 157. Intervention, as we have it, is a peculiar proceeding, and should not be extended so as to take the place of equity suits, which furnish ample remedy in most cases. The error committed is not, however, available to the appellant, excepting in the disposition of the case made hereafter.”

In the note to *Brown v. Saul*, 16 Am. Dec. 175, the authorities on this question are also collected. To the same effect see *Lecroix v. Menard*, 14 Am. Dec. 161 (La.) and note; *Clapp & Co. v. Phillips & Co.*, 92 Am. Dec. 545 (La.); *Kansas C. P. Ry. Co. v. Fitzgerald* (Neb.), 49 N. W. 1100; *Bray v. Booker*, (N. D.) 72 N. W. 933; *Smith v. George T. Smith Mfg. Co.*, (Mich.); *Yetzer v. Young*, (S. D.) 52 N. W. 1054.

So in *Murray v. American Surety Co. of New York*, 70 Fed. 341, the Court said:

“It is equally clear that neither the bank commissioners nor the creditors of the bank had any right of intervention in the proceedings instituted under the provisions of sec. 11 of the bank commissioners’ act, for the purpose of enjoining the bank from transacting business. Neither the bank commissioners nor the creditors could have instituted such a proceeding. That authority is vested solely in the people of the state. To entitle the bank commissioners or the creditors to intervene, by motion or petition, *their interests must be such that, if they had brought the original proceedings in their own name, they would have been entitled to recover.* Pom. Rem. & Rem. Rights, sec. 430. (Our italics.)

“In *Horn v. Water Co.*, 13 Cal. 69, Field, J., said:

“ ‘The interest mentioned in the statute, which entitled a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.

\* \* \* To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, which is the subject of litigation.’

“See also *Smith v. Gale*, 144 U. S. 518, 12 Sup. Ct. 674.”



The trial court cites and quotes in support of its decision portions of the case of Ruggles v. Cannedy, (Calif.) 53 Pac. 912, in which case the Court quotes from Roan v. Winn, 93 Mo. 503. The California case has no application to the one at bar. It is a case under the local insolvency law.

Sec. 3440 of the Civil Code of California declares that a transfer of or lien upon personal property may be voided at the instance of a creditor or of him upon whom the estate of the debtor devolves in trust. The Court, after stating that although in sec. 2957, relative to the effect of chattel mortgages as against creditors, the clause as to successors in interest or trustees is not included, says:

“We do not regard the omission in sec. 2957 of the Civil Code to declare that those upon whom the estate of the debtor may devolve in trust have the right to void the mortgage, as being at all important.”

And, after citing several authorities and distinguishing between an assignee for the benefit of creditors and an assignee under the local insolvency statute, the Court says:

*“It is determined, therefore, in this state that the powers of the assignee in the premises are not limited to cases of fraud in fact.”*

The decision rested entirely upon the local statute.

The Court continues:

“But, independent of these reasons, there is still another consideration by which such an action as this upon the part of the assignee in in-

solvency is justified and upheld. By sections 18 and 21 of the insolvent act, all of the estate of the insolvent passes to the assignee. As is said in *Brown v. Bank, supra*, 'the assignee has the right to sue for and recover everything due to the estate for the benefit of the creditors.' *While, as between the assignor and his vendee or mortgagee, the transaction is valid, as between him and his creditors it is void, and the title still remains in him. This title passes to the assignee in insolvency for the benefit of the creditors, and justified him in maintaining an action in their behalf to reduce the property to possession.* 'The statute provides for the assignment of property by insolvents, to the end that it may be appropriated to the payment of debts. It authorizes proceedings to subject the property of debtors to the payment of their debts. As between the creditors and the debtor who fraudulently conveys property to defeat them, he is regarded as holding the title to or an interest in the property conveyed, and it may for that reason be made subject to his debts. If he holds no such interest, the law will not permit the creditors to appropriate the property, for it would not suffer the property of another to be taken for his debts. It thus appears that the debtor did hold as to the creditors an interest in the property, and that it passed to the assignee. It is said that the assignee takes the derivative title from the debtor, and stands in his shoes. This is correct so far as persons other than creditors are concerned. As we have seen,

as to creditors the assignee is regarded by law as holding an interest in and title to the land." (Our italics.)

The case of *Roan v. Winn*, 93 Mo. 503, also arose under and was decided entirely upon the local statute. The Court in effect said that it is a rule so well established as not to require the citation of authority in support of it, that before a creditor can proceed in equity to have a deed, made in fraud of creditors of the grantor, set aside and the property subjected to the payment of his debt, he must first have his lien established at law, and while the plaintiff did not sue and get a judgment, the assignee in insolvency adjusted his claim and gave a certificate therefor, which adjudication under sec. 376 of the Rev. Stats. of Missouri is, so far as its finality is concerned, the same as a judgment. Moreover, in this case the Court said that the assignee stood in the shoes of the assignor and could not set aside any conveyance, valid as against the assignor and allow the creditors to secure their judgments by proving their claims.

The statute referred to in this case was construed in the case of *Eppright v. Kauffman*, 90 Mo. 25. In discussing sec. 279, Rev. Stats., the Court said:

"These statutory provisions are too plain to require extended comment. When the assignee passes on a claim and allows it, the question involved therein becomes *res adjudicata* and the decision of the assignee is final; in a word, a judgment having all the force and conclusive attributes of any other judgment."

Neither the California nor the Missouri cases cited by the learned District Judge sustain his decision for they rested upon the peculiar statutes of those states as construed by the local courts and they were quite the reverse of the Idaho statutes as construed by the Idaho Supreme Court.

As stated before, there are many cases where the local insolvency statutes gives the creditors or assignees either greater or lesser rights, but these cases would be as inapplicable as those cited by the Trial Court.

Even in California where the question of the rights of the receiver in suits other than insolvency proceedings under the state law, the Court has held differently.

In *Pacific Ry. Co. v. Wade*, 27 Pac. 769, where a receiver was appointed at the instance of a judgment creditor, the Court said: "The property of the cable company is in *custodia legis*. The receiver is indifferent between the parties. His possession is the possession of the Court for the benefit of all persons interested whether named as parties in the action or not, and cannot be disturbed without the consent of the Court."

And in the case of *Garniss v. Superior Court of San Francisco*, 26 Pac. 351, being a case where a receiver had been appointed in an ejectment suit, the Court said:

"Though a receiver may be and generally is appointed on the application of one of the parties interested in the property which he is to preserve,



his holding is not merely for the benefit of such party or of any other party. It is the holding of the Court for the equal benefit of all persons who may be finally adjudged by the Court to have rights in it. Where, however, the rights of the parties are established, he is considered as holding for the benefit of the parties entitled to the property."

Beach, Receivers, sec. 252.

In the case of *William Von Roun v. Superior Court of San Francisco*, 58 Cal. 358, it appeared that prior to the appointment of an assignee in the insolvency proceedings a receiver had been appointed, and the Court says:

"It seems to be the impression of the counsel of the applicants for the writ, that they have a lien acquired by virtue of the levy of the writ of attachment on the property seized, which will be lost if the property is turned over to the Receiver. This is an entire misapprehension of the law. *The appointment of a receiver works no injury to the least right of any one.* It would be strange if it did. *The receiver is the hand of the law, and the law conserves and enforces rights—never destroys them. His appointment determines no right, and in no way affects the title of any party to the property in litigation.* This was so determined in *Coburn v. Ames*, 52 Cal. 385; see also *Willink v. Morris Canal & Banking Co.*, 3 Green Ch. 377; *Matter of Colvin*, 3 Md. Ch. Decisions, 278-302; *Chase's Case*, 1 Bland, 206, 213; s. c.

17 Am. Dec. 277; *Beverly v. Brooke*, 4 Gratt, 187, 208; *Skip v. Harwood*, 3 Atk. 564; 2 Wait's Pr. 203. *If the applicants have any lien, the receiver holds the property subject to such lien, as fully as did the sheriff; and if such property is sold by the receiver, whatever lien exists attaches to the proceeds.* (High on Receivers, sec. 138; In re N. A. G. P. Co., 17 How. Pr. 549; *Hall v. Merrill*, 9 Abb. Pr. 121; *Rich v. Loutrel*, 18 How. Pr. 121.)" (Our italics.)

These cases merely go to show that where the local insolvency statutes are not involved, the general rule for which we contend is followed. The cases heretofore cited to the effect that general creditors cannot under the statutes of Idaho intervene and contest the lien of the Trustee, are based upon the theory that they have no such interest as to entitle them to intervene. In no event, however, should an intervention have been allowed where they were already represented in the foreclosure suit by a receiver. If they had acquired information that would defeat the lien of the mortgage and desired therefor to contest the mortgage, their duty was plain—they should have applied to the receiver to make the contest in his representative capacity, and furnished him the evidence in their possession. Clearly, however, to have done this would have meant an equitable and pro rata distribution among all creditors, including the Trustee, to the extent of his deficiency, of the assets that the Receiver might have been able to wrest from the secured creditors.

In *Sands v. Greeley & Co.*, 80 Fed. 195, the question arose as to whether or not certain creditors had a right to intervene, the Court saying:

“This Court is also chary as to allowing intervention by persons interested in the funds of a receivership. It does not grant such relief when all the rights of the parties applying may be conserved without it. Intervention implies the making of a new and independent party to the litigation with an independent attorney, and in many cases an independent counsel. *The Court held that intervention by persons interested in the funds would not be permitted if their rights could be conserved without it*, since such interventions multiply the number of litigants, and if begun in the case of one creditor cannot be consistently denied as to others, thereby resulting in unnecessary expense and confusion of proceedings.”

We believe it needless, however, to cite further authorities to the effect that the Receiver is the proper party to enforce the rights of the creditors and that such creditors should not be allowed to intervene unless it appears that the Receiver refuses to enforce their rights or fails to do so properly. In this case, there is no showing that the Receiver at any time refused to enforce the rights of any creditor, and, as appears from the decision of the trial court, the Receiver at all times made the same objections as the intervening creditors.

In some cases arising in Pennsylvania and Missouri, construction has been given to the statutes

relative to the avoidance of chattel mortgages that is quite at variance with the settled construction of the Idaho statute.

In the case of the First Nat. Bank v. Connett, 5 L. R. A. (N. S.) 148, 142 Fed. 33, the Court said:

“Such a mortgage is also utterly void as to simple contract creditors who extended credit after it was given and who have secured no title, by lien preference, execution, attachment, or otherwise. As to them, the subsequent recording of the instrument is of no effect. It cannot be asserted against the enforcement of their demands.’

And in Landis v. McDonald, 88 Mo. App. 335, where the mortgage was unrecorded, but the mortgagee took possession prior to any lien of a creditor attaching to the property, but after the debt of the creditor had accrued, the Court held that such creditor could nevertheless avoid the mortgage.

And in Pennsylvania, it was held in Brunswick & Balke Co. v. Hoover, 95 Pa. St. 508, and Forest v. Nelson, 108 Pa. St. 481, that general creditors could attack an unrecorded conditional bill of sale, and that a receiver for such creditors had the same right.

Manifestly, cases from <sup>these</sup> jurisdictions can have no application, in the light of local statutes and decisions, to the case at bar.

It must be admitted that all the creditors at the time of the appointment of the Receiver had an interest in the property of the corporation. As against the corporation the property and assets of the cor-



poration constituted a trust fund to be administered according to the respective rights and priorities of all parties in interest. Where the statute of a state, or the decisions in the construction thereof, permit a general creditor to set aside a conveyance or incumbrance or bill of sale, the appointment of a receiver suspends that right, but surely such appointment does not divest him of such right for, as the lower Court said in quoting with approval from another Court: "It is manifest that it would utterly defeat the banking act if, after the suspension, the assets remain subject to levy, execution, or attachment, and, therefore, that the passing of the assets into the hands of the Receiver removes all the property of the bank from liability to process to secure satisfaction of judgments." The creditors' rights as they existed at the time they were suspended by such appointment can now be enforced by the Receiver. This is clearly distinguishable from the misapprehension that the trial court had to the effect that not only were his rights preserved but that by virtue of such appointment he acquired a different relation to the property and additional rights not previously enjoyed. If the trial court's view were correct, that a creditor who had no right to contest a chattel mortgage in the State of Idaho prior to the appointment of a Receiver, secured such a right by virtue of such appointment, the following situation might well occur: Sec. 4304, Rev. Codes of Idaho, provides for the posting and publication of notice where property is attached by virtue of writs issued from the state

courts and provides that "any creditor of the defendant, who, within sixty days after the first posting and publication of such notice, shall commence and prosecute to final judgment his action for his claim against the defendant, shall share pro rata with the attaching creditor in the proceeds of defendant's property where there is not sufficient to pay all judgments in full against him." As we have seen under the decisions of the State of Idaho, the intervening creditors in this case could not have contested this mortgage unless they had first secured a lien by attachment or other process. In order to place themselves in a position to contest the lien of the Trustee, they would have had to comply with the statute and permit *all the creditors of the Power Company who in compliance with the statute secured judgments likewise against the Power Company, within the time provided, to pro rate in the proceeds of the property.* This would have effected the same result as if the Court had held that the Receiver was entitled to contest the lien of the Trustee and to distribute the proceeds equitably and ratably among the creditors.

In either case, these general creditors would have had to pro rate with the other general creditors as well as with the Trustee, to the amount of its deficiency. Instead of that, however, a court of equity permits these favored creditors to circumvent the statute which requires equity and pro rating between attaching creditors. And it accomplishes the emasculation of the statute by appointing a receiver for the

“protection” of all creditors and interests; and then holds that such appointment deprives the creditors of the right to pro rate either under the statute or the principles governing the administration of the receivership suit. It may be well to cite a few jurisdictions in which the rule of the Federal Courts, and for which we contend, is followed where no local statutes qualify the same.

Woodland v. Wise, (Md.) 76 Atl. 503.

National State Bank v. Vigo County Natl. Bank, (Ind.) 40 N. E. 799.

Polk v. Johnson, (Ind.) 76 N. E. 634.

City Bank of Wheeling v. Bryan, 86 S. E. 8.

McClurg v. State Bindery, (S. D.) 53 N. W. 428.

Cramer v. Iler, 63 Kan. 579, 66 Pac. 617.

Sumner Iron Works v. Wolten, 61 Wash. 689, 112 Pac. 1108.

Ardmore Natl. Bank v. Briges Machinery Co., 20 Okla. 427, 94 Pac. 533.

In many of these cases, as well as those heretofore cited, the courts have discussed the question in a general way, and they have not always expressed the relation of the creditors to the property in the hands of the receiver with perfect accuracy. Nevertheless, the doctrine that runs through them all is entirely clear. It is true that these assets are a trust fund, as against the corporation, in which each creditor has a certain right or equity to be preserved by the receiver for his benefit.

In this case the general creditors Guy I. Towle, Carl J. Hahn, Jake M. Shank, and L. M. Plumer and E. B. Scull at the time of the appointment of the Receiver had no such right, equity or lien as to entitle them to contest the lien of the Trustee. This is clearly settled by the decisions of the Supreme Court of Idaho heretofore cited. Not having had such a right, the same could not be preserved or enforced by the Receiver.

We shall next consider whether a general creditors' suit can be made into a contrivance whereby the moving parties can obtain an advantage over other creditors, equally within ~~the~~ protecting influence.

### III.

*Where the purpose and object of the suit wherein the Receiver is appointed and the prayer of the bill of complaint are for the appointment of a receiver to marshall the assets and hold and manage the same for the preservation and protection of every interest therein, no one creditor or class can by virtue of such appointment acquire a right to defeat another interest, unless he had such right prior to the appointment.*

As stated heretofore, the Receivership suit was not commenced by Towle for the purpose of impounding any specific property for the satisfaction of any specific claim or interest. Towle prayed for no lien on behalf of himself or any other unsecured creditor. In his bill of complaint he asked the Court to fully protect and enforce the rights and equities of the complainant and *all other creditors* of the defendant



and other parties in interest (Rec., 169), and that the Court ascertain the rights of the complainant and *all other creditors* and fully administer the property and funds according to the respective liens and priorities existing therein. (Rec., 167, 168.)

As heretofore shown, even in the cases where the theory of the action and the purpose and object thereof are not so clearly and definitely set out, the general chancery receiver holds the property, and, in the administration of the trust, preserves and enforces the rights of all parties as of the date of his appointment. He does not impound any specific property for any certain interest; he does not sequester any assets for any creditor or class of creditors. *A fortiori*, then, is this true where the bill of complaint is clearly framed on the theory that the Receiver is to hold the property for the benefit of every interest therein, and that the assets be distributed equitably and in accordance with the respective rights and priorities of the various claimants as of the date of the appointment of the Receiver. As we have seen, under the laws of Idaho the general creditors Guy I. Towle, Carl J. Hahn, Jake M. Shank and L. M. Plumer and E. B. Scull had no such lien as to entitle them to contest the lien of the Trustee. Where the Receiver is a general chancery Receiver of a Federal Court, we have also seen that such creditors do not acquire any additional rights or lien by virtue of such appointment. *A fortiori*, then, in this case where there can be no doubt but that the Receiver was not appointed for the purpose of impounding or sequester-

ing the property <sup>for</sup> of any creditor or class of creditors, but was to hold and administer the property according to the rights of all, at the date of his appointment, such creditors cannot by virtue of his appointment acquire rights that they did not previously have.

This principle is set forth most clearly in the case of *Haehnlen v. Drayton*, (C. C. A., 3rd circuit), 192 Fed. 300. The question there was whether by the appointment of a receiver the income was impounded for any specific party. Specifically, both the bondholders and judgment creditors claimed this income. The bill of complaint was practically identical, as appears from the case, with the facts and prayers of the one filed by Guy I. Towle in the Receivership suit here. The judgment creditor in his bill of complaint stated that he filed it on behalf of himself and all other creditors of the defendant corporation. The Court says:

“The Court took possession of the assets of an admittedly insolvent corporation, not for the benefit of the complainant and the other judgment creditors named in the bill of complaint—the Court was not asked to do that—but *for and in behalf of all the creditors of the corporation, ‘secured and unsecured’*. The complainant explicitly asks that his right and the rights of all the other creditors of the defendant company, ‘both secured and unsecured’, in and to the property of the said defendant company, may be ascertained and protected; that the Court would

administer the estate constituting the entire railway and property of the defendant, and for such purpose *marshal its assets and ascertain the respective liens and priorities existing upon each and every part of the said lines*, and the amounts due and the rights, liens and equities of each and all the creditors of said defendant company'. As already stated, the bill in no wise *attempts to impound the income for the benefit of the complainant and the other judgment creditors*. Not only is no such request made, but no preference or priority is asserted in their behalf, as a class, or in behalf of the complainant as an individual. Indeed, its whole framework and structure is utterly inconsistent with the claim now set up by them. At the outset of the bill, Drayton states, as already appears, that it was filed in his own behalf, and in behalf of all others in like interest, and later that he had recovered a judgment against the defendant corporation, and that was all he said in his own interest. Giving those statements their full force and disregarding any contravening allegations, it might well be doubted whether the bill could properly be construed to be a creditor's bill; but however that may be, and however strong the complainant's position was, he immediately abandoned, or at least waived it, by setting up facts and circumstances and praying for relief wholly inconsistent therewith. It is impossible to perceive how his present claim can be sustained. He nowhere asserts a claim

to the income or asks to have it impounded for his own benefit, but on the contrary for the benefit of all the creditors, 'secured and unsecured'. *Consequently, the filing of his bill did not amount to what has been called an 'equitable levy'. Indeed, the allegation of the bill to the effect that it was filed for himself and others in like interest, is directly contradicted by an allegation immediately preceding the prayers of the bill, wherein he states that it is filed 'in behalf of himself and all other creditors of the defendant corporation.'*" (Our italics.)

The Court then distinguishes and quotes with approval the decision of the Supreme Court of the United States in *Sage v. Memphis & L. R. R. Co.*, 125 U. S. 361, 31 L. ed. 694, stating that in that case the judgment creditor who filed the bill applying for a receiver was entitled to the income derived from the operation of the road by the receiver, quoting Mr. Justice Harlan as follows:

"It is true also that Sage did not sue in behalf of all the creditors of the company or of such as might come in and contribute to the expense of the litigation. He was not bound to pursue that course. It was his privilege under the law to sue for his own benefit, and it was within the power of the Court for his protection as a judgment creditor, to place the property of the debtor company in the hands of a receiver for administration under its orders.

"But we do not perceive any legal ground upon



which they are entitled to the net earnings of the property, while it was in the hands of the receiver in a suit instituted by a judgment creditor for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors. His suit was in effect an equitable levy for his benefit upon the net income of the property."

The Court also cites with approval the case of *Seibert v. Minneapolis & St. L. Ry. Co.*, 52 Minn. 246, 53 N. W. 1151, which case also distinguished the case of *Sage v. R. R. Co.*, *supra*, saying:

"The purpose of that action was only to satisfy the plaintiff's claim, and for that purpose the receiver was appointed and the income was earned; but the purpose of this action is, in part at least, to adjust the rights of all the parties, as well to the income as to the body of the property. For the purpose of adjusting their rights to the income, it was necessary for the Court to lay hold upon, not merely that portion which the plaintiff might be entitled to, but that which all the parties were entitled to. The order appointing the receiver not assuming to appropriate it to plaintiff, the Court was to be regarded as taking and holding it for all the parties, as their rights and interests might appear, at least so long as none of them made objection."

"See also *Union Trust Co. v. Illinois Midland Ry. Co. et al.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963."

Mr. Justice Harlan, in *Sage v. Memphis & L. R. R. Co.*, further said:

“But we do not perceive any legal ground upon which they are entitled to the net earnings of the property, while it was in the hands of the receiver, in a suit instituted by a judgment creditor *for the protection of his own interests, and not of the interests of the trustees, or of the bondholders, or of other creditors.* His suit was, in effect, an equitable levy for his benefit, upon the net income of the property.” (Our italics.)

Another case that sets forth concisely the nature of the suit commenced by Guy I. Towle, is *Hancock v. Wooten*, 11 L. R. A. 466. This was a case arising in North Carolina. The Court, speaking in reference to the rights of a certain party to share in a certain receivership suit, said:

“In order to determine this point, it is necessary to consider the true character of this action. It is claimed that it is in the nature of a creditors’ bill and that in such actions all creditors may, at any time before final decree, be allowed to come in and prove their claims. Undoubtedly, such is an incident of what is ordinarily called a ‘general creditors’ bill’. Such bills are usually instituted for the purpose of winding up the insolvent estates of deceased persons or the affairs of a corporation. These may be illustrated by the cases of *Pegram v. Armstrong*, 82 N. C. 326; *Wordsworth v. Davis*, 75 N. C. 159; *Long v. Bank of Yaceyville*, 81 N. C. 41; *Glenn v. Farm-*

ers Bank, 80 N. C. 97; Dobson v. Simonton, 93 N. C. 268. In such cases there are many parties standing in the same situation as to their rights or claims upon a particular estate or fund, and the shares of a part cannot be determined until the rights of all the others are settled or ascertained. Of this nature, also, are bills brought to enforce trusts or assignments for creditors, and other instances where there is a community of interest, or where the law devolves upon the Court the duty of taking a fund into its custody, and distributing it according to the respective interests of the parties. *In such cases, no priority can be acquired by one party suing or making himself a party before the others; and, perhaps one who has vainly endeavored to defeat the purposes of the action may, upon proper terms, be allowed his share in the fund. Such creditors' bills, however, are totally different from those instituted by an unsecured creditor (or several creditors if they choose to unite) against a living debtor. Here the field is open to all, and he who first secures a priority shall reap the reward of his diligence. Such bills are often said to be in the nature of an equitable *fi. fa.* or equitable levy (Bispham, Eq., sec. 528), and under them the vigilant creditor may acquire a priority as he does when he pursues the analogous remedy of execution at law. Bills of this kind are called 'judgment creditors' bills' (see Harv. Law Rev. Oct. 1890), and are so familiar in our practice*

that it is hardly necessary to illustrate them by a reference to actual cases. They were entertained in equity for the purpose of subjecting equitable and other interests which could not be reached and sold under execution, and also for the purpose of removing obstructions to legal remedies, as by setting aside fraudulent conveyances and the like." (Our italics.)

And so in this case, no priority was sought or acquired by the party suing or intervening before the others. Here it was clearly the duty of the Court to take the fund into custody and distribute it according to the respective interests of the parties. The right of any one party cannot be determined nor can he be paid until the rights of all the others are settled and ascertained. We shall later discuss more fully the right of the Court to pay in full these favored creditors prior to ascertaining the rights of other creditors and prior to entering the deficiency judgment of the Trustee. Had this case been one, as stated by the Court in the case last quoted from, where the field was open to all—where the first who secures priority shall reap the reward of his diligence—the situation would be quite different. And such a case is sometimes entertained in equity for the purpose of subjecting and impounding certain interests for the satisfaction of a certain claim; clearly, such a case is in the nature of an attachment. But where, as in this case, the Receiver was appointed for the purpose of administering the assets and preserving and enforcing the rights of *all* parties



and in accordance with the relation that such parties had at the time of the appointment of the Receiver, certainly no one creditor or class of creditors acquires, by virtue of the appointment of the Receiver, any rights in any property in addition to the ones that he had.

#### IV.

*The rule governing the administration of assets in a general creditors' suit is substantially the same as under the Bankruptcy Act before the recent amendment.*

Prior to the 1910 amendment of the National Bankruptcy Act, although the Trustee could enforce and was vested with the rights of the creditors, he clearly, in the absence of specific statutory authority, had no greater rights than did the creditors he represented. The same statements relative to the effect of receivership proceedings are used when speaking of proceedings in bankruptcy; that is, proceedings in bankruptcy, commenced by one or more creditors of the bankrupt for the benefit of all, are in the nature of an equitable attachment against the estate of the bankrupt. (Cases citing in re Hinds, Fed. Cas. 6516.) The assets in the hands of the Trustee are said to be held in trust for the creditors, as in receivership proceedings, and the trustee, like the receiver, represents all the creditors.

In *Board of County Commissioners v. Hurley*, 169 Fed. 92, the Court said:

“ \* \* \* \* \* On that date the property of the bankrupt passes from his control to the Court

or to its receiver, and thence to the trustee in trust for the creditors of the bankrupt in proportion to the amounts of their claims at that time. On that date there vests in each creditor as *cestui que trust* an equitable estate in such a part of the property of the bankrupt as the amount of his provable claim at that time bears to the entire amount of the provable claims against the estate. On that date the bankrupt law deprives a creditor of all his common law remedies to collect his debt out of the property of his debtor and to collect subsequent interest on his claim against that property, and gives him in lieu thereof this equitable estate in the property of the bankrupt."

It was settled law that prior to the amendment of 1910 the trustee in bankruptcy had no greater rights than those of the creditors that he represented. By the amendment of 1910 the Trustee was deemed vested with all the rights, remedies and powers of a creditor, holding a lien by legal or equitable proceedings; and as to all property not in custody of the bankrupt Court, he was deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. This rule is probably best stated in the case of *In Re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, where the Court said:

"The bankrupt act does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or to his creditors, at the time when the trustee's title ac-

crues. The present act, like all preceding bankrupt acts, contemplates that a lien good at that time as against the debtor and as against all of his creditors shall remain undisturbed. If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee; and if it is one which was invalid as to some particular creditor, though valid as to other creditors, the trustee is in certain cases subrogated to the rights of that creditor. The provisions which have been quoted do not necessarily touch a lien which at the date of the adjudication of bankruptcy was valid as to the bankrupt, and could not then be disturbed by any of his creditors."

In the case of *In Re Collins*, Fed. Cas. No. 3007, the Court said:

"I think the position is a sound one, that the assignee represents the creditors, and that he is authorized and is bound to protect their interests. In the instance of a fraudulent conveyance, where, by his participation in the fraud, the debtor has lost the right to attack the conveyance, I do not doubt the power of the assignee, as representing creditors, to attack it, wherever creditors could do so. The difficulty here is, that the creditor has no such right. Has the assignee any other or greater rights than the creditor? The New York statute declares the mortgage, unless filed, to be void as against the creditors of the

mortgagor, and as against subsequent purchasers and mortgagees in good faith. The creditors spoken of have been shown to be those having judgments and executions. Subsequent purchasers or mortgagees in good faith are those who pay or advance their money upon the security of the property, without knowledge of the previous encumbrance. *Thompson v. Van Vechten*, 27 N. Y. 581, *Van Heusen v. Radcliff*, 17 N. Y. 580. The assignee cannot claim to hold either of these positions. So far as it is obtained from state laws, the assignee would seem to have no power to attack the mortgage. He does not represent a judgment and execution, or a purchaser or mortgagee in good faith. \* \* \* \*

“I do not perceive how the transfer from the bankrupt to the assignee relieves from the necessity of obtaining that specific lien upon the property which is needed to authorize an attack upon the mortgage. The New York Reports are full of cases to the effect, that a simple debt, or a judgment even, will not justify a bill to set aside, as fraudulent, a conveyance of real estate. The creditor must first have a deed or mortgage from the debtor, a sheriff’s certificate of sale on execution, or some equivalent right giving a claim upon the specific property conveyed.”

This question was firmly settled by the Supreme Court of the United States in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 785. Although that case came up from the State of Ohio, the doctrine estab-



lished by the decisions of the State of Ohio as to rights of property acquired by a receiver appointed in that state was clearly distinguished in *Kansas City Equipment Co. v. Degnan*, (6th Circuit), 184 Fed. 834, 106 C. C. A. 158, where the Court said:

“The contention, then, that the receiver in the present case is in a better position than that accorded to a trustee in bankruptcy is not tenable because the feature of the decision in *York Mfg. Co. v. Cassell*, 201 U. S. 353, 50 L. ed. 782, which holds that bankruptcy does not operate as an attachment or lien in favor of creditors has not either in terms or principle any relation to the rule prevailing in Ohio as to the effect of a receivership upon the rights of creditors. \* \* \* \*  
In our judgment, this is but applying a settled rule in Ohio touching the point of the appointment of a receiver and a seizure made through him.”

The trial court in the case of *In Re Lane Lbr. Co.*, 210 Fed. 82, passed on the identical question as to the right of a trustee prior to the amendment of 1910 to set aside a conveyance or encumbrance which could not have been set aside by those represented by him. The Court said:

“Prior to the amendment of sec. 47, it was quite generally held that a trustee in bankruptcy could not, upon behalf of general creditors, assail the validity of such an instrument, because such creditors, having no specific lien upon the property, were in no position to make the attack, and there-

fore the trustee, acting upon their behalf, could assert no better right. In re Economical Printing Co., 110 Fed. 514, 49 C. C. A. 113, Remington on Bankruptcy, secs. 1207½ to 1210, the amendment meets this emergency by conferring upon him the status of a creditor who has such lien and may therefore object to the assertion of a lien under an unrecorded mortgage."

## V.

*The rule in general creditors' suits is also substantially the same as the rule under the acts of June 3, 1864, and June 30, 1876, providing for receivers of insolvent national banks and the sequestration of the property and assets thereof for the redemption of circulating notes and the payment of the debts of creditors, the appointment of the receiver in no way affects the rights of any creditor.*

It will be noted that the trial court quotes Judge Taft in the case of Chemical Natl. Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155. The trial court, however, uses the excerpts quoted from Judge Taft to support a proposition diametrically opposed to that contended for by Judge Taft. After the quotation mentioned by the trial court, Judge Taft says:

*"The national banking act is framed to secure equality of distribution among the creditors as far as is consistent with the previous contract right of those creditors. If one creditor secured collateral for his loan when made that produced an inequality between him and the other creditors who have no collateral, which it cannot have been*

the purpose of the banking act in its provisions for winding up the insolvent bank to modify, reduce or defeat."

Judge Taft, admitting that the appointment of the receiver was a sequestration and seizure of the assets of the bank on behalf of all creditors, nevertheless says:

"The suspension of the bank and its seizure by order of the comptroller have no effect to change the right of the creditor with reference to its collateral. He enjoys precisely the same advantage over the unsecured creditor with respect to the collateral that he did before the suspension. With reference to obtaining satisfaction out of the general assets of the bank before suspension, their rights were equal. So must their rights be after the sequestration of the assets for ratable distribution."

This case was followed by the Court in *Commercial and Savings Bank v. Robert H. Jenks Lbr. Co.*, 194 Fed. 739, where a number of other cases are cited to the same point.

The principle stated by Judge Taft to the effect that the appointment of a receiver should not operate to change the status of the two classes of creditors, one secured and the other unsecured, in their relation to each other, or to the property sequestered for their benefit, was announced by the trial court itself in the case of *Westinghouse Electric & Mfg. Co. v. Idaho Ry. L. & P. Co.*, 228 Fed. 972. In this case a receiver had been appointed at the instance of a

creditor and the question was whether or not the trustee who thereafter foreclosed upon its mortgage could share in the income during the receivership pro rata with the other creditors to the extent of its deficiency. The immediate question was whether or not the Trustee could share or pro rate on the basis of its whole claim filed in the receivership suit, or whether it could merely share on the basis of its deficiency. The trial court held that the trustee had a right to pro rate as a general creditor in the assets of the Power Company, not subject to or impounded for the benefit of its lien, to the extent of its deficiency and on the basis of its deficiency. In that case a receiver had been appointed in a general creditors' suit, as in the case at bar, and there was no effort made to impound the income for the special benefit of either the Trustee or any other creditor. The Court based its decision on the ground that the appointment of the receiver did not operate to the special advantage of any creditor or party, and that to hold that the trustee had a right to share on the basis of his whole claim would mean that the receivership operated to his advantage and to the disadvantage of the unsecured creditors. The Court quotes Judge Taft at length, and then says:

"I have quoted at unusual length in order to disclose fully the basis and import of the reasoning by which the rule is supported. *In substance it is that the appointment of a receiver should not operate to change the status of the two classes of creditors, one secured and the other unsecured, in*



*their relation either to the estate or to each other; that but for the receivership the collateral holder would have had the right to sue and satisfy his debt by levy and execution against the entire property, regardless of his collateral; and that he cannot justly be deprived of that right to his disadvantage, and to the advantage of the unsecured creditor, by the institution of the receivership.* Now, if he adopt this course of reasoning in the instant case, what is the result? The trustee here held a claim secured by mortgage. The property mortgaged is situate in Idaho, and the mortgage contract is therefore to be adjudged by the local law. By section 4520 of the Revised Statutes of Idaho it is provided that: 'There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property.' Any such action is defined to be a foreclosure suit. In such suit, after sale, but not until after sale, the plaintiff may have personal judgment, which, and which only, he may satisfy by levy and execution. Such being the law, to hold that the trustee here may receive a dividend upon its entire claim and hold its security in reserve for the satisfaction of the balance, if any, remaining unpaid, is manifestly to reverse the statutory order, and it would be to do just what in the Armstrong case was held could not justly be done, *for thus the receivership would operate to alter the relation of the two classes of creditors, to the advantage of the secured creditor and to the disadvantage of the*

*unsecured.* Had not the receiver been appointed, the unsecured creditor could have passed his claim to judgment and satisfied the same by levy and execution; but this the trustee could not have done, for it was without such remedy until it had exhausted its security, and then it could levy, not for the full amount of its original claim, but only for such deficit as remained unpaid. The equivalent of the remedy which was thus available to it without a receivership is, under the circumstances, the recognition of this deficit, and that only, as the basis of a ratable distribution, and this is the rule which will be followed." (Our italics.)

The reasoning of the Court on the effect of the receivership on the relation of the creditors to each other and to the assets of the estate is not only sound but it is in harmony with the great weight of authority on the subject, and we cannot understand why the learned District Judge did not follow it in the case at bar. His failure to do so seems clearly reversible error.

We next pass to a consideration of the proposition that if either the Receiver or the creditors who had invoked the jurisdiction of the Receivership suit were entitled to contest the validity of the mortgage, the assets recovered should be turned over to the Receiver for administration and distribution in the general creditors' suit for the pro rata benefit of all creditors, including the Trustee on its claim for deficiency.

## VI.

*Even if the creditors had a right under the State statutes and decisions to contest the lien of the Trustee, or if the Receiver as their representative or by virtue of the rights conferred upon him for their benefit by special statutes or decisions had such a right, any assets or property so taken from under the lien of the Trustee would in any event be the assets of the debtor Power Company to be distributed in the Receivership suit for the benefit of all creditors according to their respective rights and priorities.*

The Trial Court in effect held that certain general creditors who had no lien at the time of the appointment of the Receiver, acquired, by virtue of such appointment, a lien by which they could defeat the very purpose of the suit in which the Receiver was appointed. The Trial Court seemingly misapprehended the nature of the Receivership suit and utterly disregarded the very purpose for which it was brought and the principles upon which it was based.

It must be conceded that some confusion arises because of the failure of some Courts to distinguish between suits brought by judgment creditors and receivership suits such as the one at bar. In what is known as a judgment creditors' suit the field is open and the swift and vigilant are rewarded for their diligence by a preference and priority, but the very purpose of a receivership suit such as the one at bar, and the basis for the jurisdiction of a court of equity in such a suit, is to prevent such a situation. The prize is in a court of equity. It is brought there

to prevent its depreciation and destruction. The diligent and swift are prevented from securing priorities and preferences, and the property is preserved and held by the Court to prevent a situation such as the one that we find in a judgment creditor's suit. The very purpose of bringing the property into a court of equity is to prevent its being torn asunder and destroyed by the efforts of creditors to secure preferences and priorities. Clearly, there is nothing inconsistent in this theory with the principles we have set forth above. The assets are taken by the Court for equitable distribution according to the respective rights and priorities of every party. If any one creditor had a lien at the time of the appointment of the Receiver, then clearly, whether the Court allows him or the Receiver on his behalf, to enforce that lien or the rights based upon such a lien, the result is clearly consistent with an equitable distribution; and subject to these prior liens all other assets of the Power Company are distributed ratably, for, as has been said repeatedly, equality is equity, and when the assets are in the Court for equitable distribution, in the absence of a lien existing upon the property at the time of its sequestration, it will be distributed pro rata among the general creditors.

Upon what theory can a court of equity confer a lien upon a general creditor in such a suit by the appointment of a receiver for the benefit of all? There is no answer in either law or equity to this question. It is the arbitrary exercise of power under the disguise of judicial discretion in determining



the relative equities of the parties. The action or decision of the Court below was the very opposite of what it set out to do or accomplish by the Receivership suit. It defeats the other creditors to whom the Court had given assurances of protection and from whom it had by its injunctive orders withdrawn the right of attachment and self protection.

It is conceded that the creditors who were paid in full were general creditors and stood upon the same footing as all of the general creditors in the Receivership suit. Clearly, as such, any property that was part of the estate for the administration of which the Receiver was appointed, and upon which there was no prior lien, should have been brought into the Receivership suit in order that it might be equitably distributed among all creditors. If any one of them, as a general creditor, was allowed by the court of equity to go out and secure certain property of the debtor not subject to any prior lien and apply it to his claim in full, the very purpose of the suit would be defeated. In order to prevent such a situation and to prevent such a creditor from receiving a preference to which he was not entitled, clearly the Receiver in such a case is the proper party to make the contest and to bring the property into the Receivership suit for equitable distribution.

We have seen that the same situation arises in cases of insolvent national banks. All assets not subject to prior liens are ratably distributed among the general creditors; and, as was said by the Court in *Stewart v. Hayden*, 72 Fed. 402, "after this bank had

failed and this receiver had been appointed, *he was the proper party to and the only party who could maintain his suit on behalf of the creditors* of this bank to set aside a fraudulent transfer referred to in the bill and to enforce the individual liability of Stewart. *Hayden v. Thompson*, 17 C. C. A. 592, 71 Fed. 60, and cases cited; *Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488, 491; *Bank v. Colby*, 21 Wall. 609; *Hornor v. Henning*, 93 U. S. 228; *Stevens v. Oberstoltz*, 43 Fed. 771; *Bank v. Peters*, 44 Fed. 13. *These propositions are too well settled to warrant more extended notice than their statement.*" (Our italics.)

There is absolutely nothing in the record to show that the Receiver refused to act on behalf of any creditor; there is nothing in the record to show that the Receiver was ever requested to act and neglected or refused. It does appear, however, that the Receiver was in Court; that the very Court which appointed him ordered him to answer in the foreclosure suit, and that he prayed the Court to be given all proper relief and that only so much of the property of the Power Company be sold as was covered by the lien of the Trustee. It does not appear that the Receiver knew the facts set up in the pleadings by the interveners in the foreclosure suit prior to the time that the case was set for trial, but it does appear that at least when these facts came out at the trial of the case, the Receiver on behalf of all general creditors did not refuse or neglect to set up these facts but made the same objections to the lien of the Trustee as did the intervening creditors. The Court recognized that the Receiver was, on behalf of the cred-

itors represented by him, making the same objections to the lien of the Trustee as were the intervening creditors. The Court says (Rec., 181): "By intervening creditors and by the Receiver it is urged that as to personal property which the instrument purports to cover, it is void. \* \* \* \* " The Receiver was absolutely under the control of the Court. He could do no more than set up the same defense as that set up by the intervening creditors. The Receiver being in Court, the facts being admitted, and the only question being one of law, he was there claiming and ready to retain any property of the Power Company not subject to a prior lien, for the purpose of administering it in the Receivership suit equitably and ratably among the general creditors. As was held in *Perry v. Godbe*, 82 Fed. 141, the receiver's petition there was not subject to dismissal, because no evidence was introduced. He could rely upon the insufficiency of the proof introduced by the plaintiff. He had been appointed by the very Court before which he was now making the same objections as certain general creditors. As the officer of the Court appointed on behalf of the creditors of the Power Company, it was his duty to claim and retain possession of all assets of the Power Company not subject to a prior lien. It was equally the duty of the Court, if it should decide that certain personal property was not subject to the prior lien of the Trustee, to turn the same over and direct the Receiver to take possession of the same for the purpose of equitably administering and distributing the same in the Receivership suit.

Probably no one fact shows more clearly the anomalous situation than the fact that one general creditor, Carl J. Hahn, had not set up, in his answer, the defense relative to the filing and execution of the mortgage as a chattel mortgage, and that the only ground upon which the Court could possibly have given such a creditor the relief granted was either by virtue of the defense set up in his behalf by the Receiver, or because it was not necessary for a defendant to specifically plead the failure to file as a chattel mortgage.

We have already cited many authorities to the effect that mere general creditors cannot be permitted to intervene in foreclosure suits, unless they have a lien upon the mortgaged property, or an interest therein. This rule is conceded by the learned trial judge but he evolves a theory of his own for circumventing the statute and the decisions of the Idaho Courts by holding that by his action in appointing a Receiver these favored creditors acquired something in the nature of a lien which entitles them to intervene and to be paid in full even to the exclusion of all other creditors, whether secured or general. The Trial Court cites a case arising under the national banking acts to the effect that each creditor has an interest in the fund sequestered for the benefit of all. But even in such a case, surely it must be clear that the interest of any one creditor in the general assets of the debtor is merely a right to a pro rata share. It would be fundamentally opposed to the very purpose of the receivership suit to say that by virtue of the appointment of a receiver any one creditor ac-



quired such an interest as to entitle him to be paid in full when by such payment the other general creditors, standing upon the same footing, would receive nothing, or less than what would otherwise be their pro rata share. This principle is equally clear and settled, whether the proceeding be one in chancery, in bankruptcy, or under the national banking acts.

Judge Morrow, in *Clark v. Bacorn*, 116 Fed. 617, well states the rule as follows:

"It is well settled that when a corporation becomes insolvent and the corporate assets have passed into the hands of a Receiver, such assets *constitute a fund for ratable distribution among its creditors; and no creditor can, by suit commenced or by judgment recovered after the commencement of the proceedings to secure the appointment of a Receiver, secure a lien upon the corporate assets that will entitle such creditor to priority of payment.*" (Our italics.)

And the case at bar is clearly distinguishable from a case where the creditor, under local law or under the general law, had a lien prior to the appointment of the Receiver which either he or the Receiver in his behalf could enforce thereafter. Here the Court clearly bases its decision not upon a lien recognized by the laws of the State, but upon a supposed lien arising from or created by the appointment of a Receiver for the benefit of *all* creditors.

A similar question arises in those jurisdictions where a creditor or an administrator on behalf of the creditors is permitted to set aside a fraudulent con-

veyance or encumbrance made by the decedent. If the administrator sets aside such instrument, the assets recovered are to be distributed in the administration of the estate, and if there are not sufficient assets to pay all the creditors, then each will receive but a pro rata share unless priority or preference previously existed. In several jurisdictions a creditor is permitted to set aside a fraudulent conveyance, but the assets recovered by such creditor clearly cannot be applied to his claim to the exclusion of all other creditors who are on an equality with him. Such creditor must turn the property over to the administrator to be equitably and ratably distributed in the administration of the estate. Typical cases of this character are *Bottorf v. Covert*, 90 Ind. 508; *Rains v. Rainey*, 30 Tenn. 261.

The error of the Trial Court must have arisen from failure to distinguish between a suit, the purpose of which is the levying upon and impounding certain assets for the payment of one creditor or class, and an action the purpose of which is the administration and distribution of assets equitably among the creditors. The rule is well settled that where one creditor in a receivership suit appeals instead of the receiver, and the estate is augmented by such appeal, the assets or fund thus secured do not go to the appealing creditor but must be equitably distributed in the receivership suit.

High on Receivers, sec. 819-c.

*Schwartz v. Keystone Oil Co.*, 164 Pa. St. 415, 30 Atl. 297.

The same rule is followed under the national banking cases, one of which the trial court cites in its decision.

In *Bailey v. Mosher*, 93 Fed. 488, at page 491, the Court said:

“The liability of the defendants, whatever it may be, for the acts complained of in the petition, *is an asset of the bank, belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim.* It is the policy of the national banking act to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. Rev. St. U. S., sec. 5234; *Kennedy v. Gibson*, 8 Wall. 498; *Bank v. Colby*, 21 Wall. 609; *Honor v. Henning*, 93 U. S. 228; *Stephens v. Oberstoltz*, 43 Fed. 771; *Bank v. Peters*, 44 Fed. 13.” (Our italics.)

And in *Penn. S. Co. v. New York City Ry. Co.*, 198 Fed. 721, at 738, the Court says:

“Equitable distribution must govern, and the underlying ones are these: The assets of an in-

solvent corporation belong to its creditors. Although not, strictly speaking, a trust fund, they partake of the nature of one. *The administration of the estate is for their benefit. Its purpose is to make an equitable distribution. Equality is equity.* Debts and liabilities, present and future, certain and contingent, stand upon the same equitable basis." (Our italics.)

It will be noted that in this case there is a dictum to the effect that a general creditor's suit such as the one involved in the case at bar is merely an extension of a judgment creditor's suit, and this would apparently lead to the conclusion that the same sort of a lien is acquired by virtue of a general creditor's suit as that acquired in a judgment creditor's suit, but clearly such reasoning is fundamentally unsound. The idea of preference and priority which is absolutely inseparable from a judgment creditor's suit is diametrically opposed to the very purpose of a receivership suit such as the one at bar. A judgment creditor's suit is clearly in the nature of a levy in equity for the purpose of applying to the satisfaction of the claim of a creditor or class, certain property of the debtor. This equitable lien is given by the court of equity as a reward for diligence. As we have stated, in such a case the field is open and a preference and priority is the reward for vigilance and swiftness, but certainly a proceeding under the national bankruptcy act, or the national banking acts, or in a receivership suit such as the one at bar, cannot be said to be an extension of such a doctrine;



and of the three cases, most clearly in a receivership suit, wherein a receiver is appointed for the preservation of all rights and for the benefit of every party, the very basis for the jurisdiction of a court of equity and the principle upon which such a suit is based are fundamentally opposed to the idea of preference and priority. It is true that every lien and every right existing at the time of the appointment of the receiver and at the time the prize is taken into the Court is preserved, and that there is impressed upon all of the property in the custody of the Court such a trust as to entitle every party to have his rights and equities preserved, defended and enforced. The many cases heretofore cited, including many from the Supreme Court of the United States, absolutely preclude the application of the principle that one creditor, by virtue of the appointment of a receiver in a general creditor's suit, can acquire a preference and priority as against the other creditors.

In *H. K. Porter Co. v. Boyd*, 171 Fed. 305, a case coming up from Pennsylvania and following local law, giving the receiver the same rights as a levying creditor, the Court said:

“ \* \* \* \* From this it must be assumed that the receiver in this case represented the creditors in whose interest it was appointed, and was clothed with all the powers that creditors would have had in acting for themselves. \* \* \* \* The same principle applies *a fortiori* to a receiver deriving his authority, not at all from the debtor, but altogether from the Court acting in the interest and

for the enforcement of the rights of the creditors. When, therefore, on a creditor's bill a receiver is appointed for an insolvent corporation, he is not limited like an assignee for the benefit of creditors by the rights of the debtor corporation as to property held by it under a conditional sale, but has the rights of a levying creditor."

But, in this case, where under local law the creditors through their representative had a right to set aside a conditional sale, the assets were distributed pro rata and equitably among all the creditors.

"Plain justice requires that such a secret lien should be defeated in the former case; for not only does equity delight in equality, but the receivership bars creditors from pursuing the remedy, which otherwise would be open to them by way of attaching or levying on the personal chattels to defeat the lien. We perceive no force in the suggestion that to allow the receiver to defend against the establishment of the asserted lien would be to permit him to take sides as between different creditors or classes of creditors. *In such a case as the present, the rule of equity requires the pro rata division of the assets among the creditors*, subject to the allowance of costs and expenses and the adjustment and liquidation of priorities and preferences. Equality or a pro rata distribution of the assets among the creditors being the most equitable result obtainable, no liens or preferences should be recognized unless satisfactorily established; and it is not

only proper, but it is incumbent on the receiver to protect the funds or assets in his hands against all attempts of creditors to defeat equality of distribution, through the assertion of secret liens to which they are not entitled as against the liens of the general and unsecured creditors. Such a lien might be recognized and satisfied in whole or in part out of the special fund subject to it as between the original parties, in so far as such fund might be included in a surplus of assets left after the payment of all costs and expenses and other debts and claims; but only in that improbable event. But it is unnecessary to pursue this particular inquiry. In *Printing Press Co. v. Pub. Co.*, 213 Pa. 207, 62 Atl. 841, the Supreme Court of Pennsylvania held that where on a creditor's bill a receiver was appointed for an insolvent corporation he was not limited to the rights of such corporation as to chattels held by it under a conditional sale but had the rights of a levying creditor."

We have heretofore discussed the local law in Pennsylvania.

In *F. L. Smith Co. v. Orr*, 224 Fed. 71, a case coming up from Missouri, the question arose as to whether the receiver appointed in a creditor's suit in Missouri had the right and power to void an unrecorded conditional sale, no decision or statute was found by the Court to be exactly in point, but by analogy the Court found that under the law of Missouri a receiver had such a right. The Court said:

“The position of a receiver in a suit brought by a creditor against an insolvent debtor for the appointment of a receiver, the administration and sale of his property, and the distribution of its proceeds among his creditors is *more nearly analogous to that of an administrator of the estate of a deceased person* than that of an assignee for the benefit of creditors. He is appointed, his powers are conferred, and his duties are imposed by the Court and the law and not by the voluntary conveyance of the debtor. His primary duty is to hold, administer, convert into money, and distribute the proceeds of the property for the benefit of the creditors, for they have the larger, and generally the entire, pecuniary interest in it. He is appointed on the petition of a creditor for the benefit of the creditors, and is in fact their representative far more than he is the representative of the debtor.”

That such is the law in Missouri was held in *Henley v. Harmon*, 103 Mo. App. 233.

The Court also found that a receiver was “armed with process” under the statute and decisions of Missouri to attack the unrecorded, conditional sale, quoting *Thompson & Co. v. Massey*, 76 Mo. App. 197, wherein it was held that under the statute the term “creditors” meant only such as should seek to enforce their claims through the machinery of the law, saying that under legal process the creditors seek to appropriate their debtor’s effects in *invitum* as to him, whereas if they claim only under a conveyance from



him, the right to assert a higher title than he possessed depends wholly upon the nature of the consideration. This merely shows that under the local law and decisions such receiver had a right to avoid the conditional sale, but the assets so acquired were distributed equitably and ratably among the creditors.

It will be noted that in the cases above cited (*H. K. Porter v. Boyd* and *F. L. Smith v. Orr*) there are also dicta which would apparently support the theory that a receiver, by virtue of his appointment, acquires a right to avoid conveyances and encumbrances which the creditors represented by him could not have avoided at the time of the appointment of the receiver. We have already discussed the confusion between a judgment creditor's suit and a general creditor's suit, and that the idea of preference and priority given to one interest in a receivership suit by virtue of the appointment of a receiver is not only fundamentally unsound but has been repudiated by the great weight of authority, including the Supreme Court of the United States.

Probably no Court has so clearly announced the rule in a case analogous to the one at bar as the Supreme Court of Washington in the case of *Tompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741. In that case the trustee sought to foreclose a mortgage. The Court had adjudged the corporation insolvent and brought the whole of its property into court by the appointment of a receiver. The question arose as to whether the lien of the trustee was not void

under the local law as a preference as against creditors. The Court, referring to the local statute as to insolvency, says:

*"The purpose in thus placing insolvent corporations in the possession of the Courts can only be that their assets may be distributed ratably to creditors. A general assignment without preferences does not defeat this purpose, but if the estate of a corporation comes into the Court or into the hands of an assignee burdened with preferences, there is an end of equal distribution and the object of the law is defeated."*

In that case the preference was invalid as against general creditors and the lower Court had allowed several of them to intervene in the foreclosure suit and had held that the mortgage was void, and directed the Receiver to sell the property, and after paying the costs of the receivership, to pay in full the judgments of the intervenors and the balance, if any, to the appellant (the Trustee).

This is exactly what was done by the Trial Court in the case at bar. In neither of these cases had the intervenors acquired a lien. In the Washington case, however, they had a right to contest the mortgage as general creditors. The Supreme Court, however, held that it was error to allow them to intervene on the ground that they had no such lien as to entitle them to intervene under the statute of Washington, which is similar to that of the State of Idaho, and reversed the Trial Court's decision, on the ground that the assets must be distributed ratably, saying:

“We cannot approve this disposition for several reasons: At the time when the Smiths filed their intervention the Court had already adjudged the corporation to be an insolvent and brought the whole of its property into the Court by the appointment of a receiver. \* \* \* The receiver having been thus appointed, *represented the corporation and all of its creditors*. He was a trustee for both. It was his duty under the orders of the Court to take proof of all claims presented to him; to recommend the allowance of those which he deemed just and the disallowance of those as were improper. It was not necessary that any claim thus presented should be in the form of a judgment, or that there should be technical interventions. If claims were disputed by the receiver, the Court had full power to decide the points at issue, calling in a jury if necessary. Any creditor, having proved his claim, would have the right to contest the claim of any other creditor, if the receiver should fail or refuse to do so in a proper case. In a word, this was a fund in Court, the beneficiaries of which should receive their respective shares as expeditiously as the nature of the property would permit, and the principles governing the proceedings are substantially those enacted into statutes of insolvency in the states and into bankruptcy acts by the United States. It was just as much the duty of the receiver in this case to oppose the appellant’s mortgage as though he had been an assignee in bank-

ruptcy or insolvency; for, although the corporation could not dispute it, he was the trustee for other creditors who could, and *it was his duty to act in their interest, to the end that all creditors should share alike. Both parties seem to have overlooked all these matters, and have proceeded as though they could expect to be paid in full, leaving other creditors nothing, there being, as appears in the case, a number of creditors who did not intervene. But the race is not to the swift alone, when the prize is in a court of equity for equal distribution.*" (Our italics.)

And so in this case. The creditors who intervened in the foreclosure suit endeavored to obtain payment in full out of the assets of the Power Company for the equitable distribution of which the Receiver had been appointed.

It will be noted that in the Washington case the Court also held that although an illegal preference was attempted by one of the creditors, he was nevertheless entitled to share equally with other creditors in a fund in the hands of the Receiver.

It is equally well established that the Trustee in the case at bar has a right to share in the general assets of the Power Company at least to the extent of its deficiency. In *Mercantile Trust Co. v. Southern States Land & Timber Co.*, 86 Fed. 711, 722, the Court said:

"Touching the third question, it is to be observed that, under the 92nd and the 8th of the equity rules, the complainants in this case will



be entitled to a decree for any balance that may be found to be due them, 'over and above the proceeds of sales' of the property on which their mortgage has been foreclosed, and to have execution issue thereon in the form used in the Circuit Court in suits at common law in actions of assumpsit. Therefore, as to any unsatisfied balance that may remain due the complainants, after the appropriation to their demand of the proceeds of the property upon which they have foreclosed their mortgage, they are on a par with other general creditors who are or may become parties to this proceeding. Such fund, then, as shall be ascertained to exist free from the lien of the complainants' mortgage or other lien that may be found to have existed at the institution of the suit, must be divided pro rata among all the creditors who establish their claims, including the complainants, to the extent of the balance of their debt, if any, remaining unsatisfied after the appropriation thereto of the proceeds of the mortgaged property."

And the trial court itself so held in the case of *Westinghouse v. Idaho Ry., Light & Power Co.*, 228 Fed. 972.

In conclusion, we submit that the action of the trial court in permitting general creditors to intervene in the foreclosure suit for the purpose of contesting the lien of appellant's mortgage is clearly contrary to the laws of the State of Idaho as construed by its highest court; and in so far as the de-

cision holds that general creditors, who have invoked the aid and jurisdiction of the Court in the Receivership suit, have acquired in such Receivership suit or by virtue of the appointment of the Receiver rights superior to the Receiver and preferences over other general creditors having equally meritorious claims, the decision comes well within the decision of this Court in *Clark v. Bacorn*, 116 Fed. 617, where it is said: "It would indeed seem anomalous that a lien adverse to the rights of the receiver could be obtained and thus interfere with one of the objects of his appointment in the control of the distribution of the assets." The decision seems contrary alike to the principles of equity and the decisions of this Court and of the Supreme Court of the United States and, we believe, of every Court where the question has arisen under statutes similar to those of the State of Idaho.

The decree, therefore, should be modified so as to provide that what is therein designated as the "Unsecured Creditors' Fund" should be paid to the appellant, The Equitable Trust Company of New York, to be paid out and distributed as is therein provided relative to the other proceeds from the sale of the mortgaged property; and if for any reason such course should seem improper under the circumstances, such "Unsecured Creditors' Fund" should be ordered paid to the Receiver for equitable distribution among all the creditors.

Respectfully submitted,

JAMES H. RICHARDS,

OLIVER O. HAGA,

J. L. EBERLE,

Residence, Boise, Idaho;

*Solicitors for Appellant,  
Equitable Trust Company  
of New York.*

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

Appellees.

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,

Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellees.

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**BRIEF OF APPELLEES**

L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, AND JAKE M. SHANK, IN REPLY TO BRIEFS OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.

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*Upon Appeal from the United States District Court for the  
District of Idaho, Southern Division*

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MARTIN & CAMERON, Residence Boise, Idaho,  
Solicitors for L. M. Plumer and E. B. Scull as Executors of the Estate of  
L. L. McClelland, Deceased.

ALFRED A. FRASER, Residence, Boise, Idaho, — 1915  
Solicitor for Jake M. Shank.

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F. D. Moulton,  
Clerk.





# United States Circuit Court of Appeals For the Ninth Circuit

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

Appellees.

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,

Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellees.

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## BRIEF OF APPELLEES

L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, AND JAKE M. SHANK, IN REPLY TO BRIEFS OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.

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*Upon Appeal from the United States District Court for the District of Idaho, Southern Division*

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MARTIN & CAMERON, Residence Boise, Idaho,  
Solicitors for L. M. Plumer and E. B. Scull as Executors of the Estate of L. L. McClelland, Deceased.

ALFRED A. FRASER, Residence, Boise, Idaho,  
Solicitor for Jake M. Shank.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

Appellees.

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,

**Appellant,**

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

Appellees.

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**BRIEF OF APPELLEES**

L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, AND JAKE M. SHANK, IN REPLY TO BRIEFS OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.

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*Upon Appeal from the United States District Court for the  
District of Idaho, Southern Division*

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**BRIEF OF APPELLEES.**

This brief is in answer to the briefs of both the appellants in this case.

There are so many inaccuracies in the Statement

of Facts set forth in the briefs of the appellants and so many colorings of the facts as stated by them that appellees have made a statement of facts and based the same on the record in this case.

These two appeals are the last of a series of joint efforts and schemes of two allied corporations, the Equitable Trust Company of New York and The American Water Works & Electric Company to save unto themselves all the assets of the debtor corporation and prevent four creditors from receiving from the assets of the debtor corporation the payment of their four claims. Though now masquerading as hostile parties, they are now and have been at all times, in this litigation hand in hand.

See par. XVIII Tr. p. 299.

Dietrich's Decision Tr. p. 304 middle of page.

## STATEMENT ON APPEALS OF EQUITABLE TRUST COMPANY OF NEW YORK AND AMERICAN WATER WORKS AND ELECTRIC COMPANY.

These appeals grow out of the decree and certain orders made in a suit brought to foreclose a deed of trust and supplemental mortgages. The deed of trust and supplemental mortgages involved purported to cover all the property of the Great Shoshone and Twin Falls Water Power Company. This latter corporation was, at the time of the trial in the lower court, and still is, insolvent and in the hands of a receiver.



The parties interested in these appeals should be grouped or arranged as follows:

First: The mortgagee or trustee under the deed of trust and supplemental mortgages. This party is the appellant, The Equitable Trust Company of New York, complainant in the court below. It feels itself aggrieved because the court allowed two creditors of the Great Shoshone and Twin Falls Water Power Company to intervene in the mortgage foreclosure suit and, together with two other creditors originally named as defendants, to contest the validity of the deed of trust and supplemental mortgages insofar as these instruments attempted to create a lien valid as against attacking creditors upon certain personal property of the debtor company. These four attacking creditors who thus answered and made this contest secured a decree of the Court to the effect that the lien of the deed of trust and supplemental mortgages, as to certain personal property of the mortgagor, was subject and subordinate to the lien of their claims because of certain defects in the form, execution, recording, and filing of the deed of trust and supplemental mortgages. (Trans. pp. 191-192). This provision in the decree of foreclosure forms the basis of the principal assignments of error made by the Equitable Trust Company in this appeal. It was stipulated by the four attacking creditors and The Equitable Trust Company of New York that all the property of the debtor corporation should be sold as an entirety, which was done, and it was further stipulated by the same parties that the value of the par-

ticular personal property upon which the four attacking creditors had been given a prior claim or lien was \$45,000.00, the approximate aggregate amount of their four claims. As before stated, the property has been sold under the decree and the Special Master who made the sale has on hand or can procure at once the sum of \$45,000.00 realized from the sale of this personal property upon which the four attacking creditors were declared to have prior liens, and the Special Master has been ordered by the Court to pay the claims of the four attacking creditors out of these funds, in accordance with the terms of the decree of foreclosure and a court order thereafter made (Trans. 204, 205, 206, 240-243). The carrying out of this particular portion of the decree of foreclosure and of the above court order have been stayed by this appeal.

Second: In a second group should be placed the four creditors who appeared and answered in the foreclosure suit, each one on his own behalf, and who, in the decree of foreclosure, were adjudged by the court to have superior claims and liens upon some of the personal property of the mortgagor, and to whom the lower court has ordered the Special Master to pay the moneys realized from the sale of such property. These four creditors are the appellees, Guy I. Towle, Carl J. Hahn, as administrator of the estate of Harry M. King, deceased, L. M. Plumer and E. B. Scull, executors of the estate of L. L. McClelland, deceased, and Jake M. Shank. They are the parties against whom are directed the appeals of both The

Equitable Trust Company of New York, the original complainant, and the American Water Works and Electric Company, a would-be intervenor.

Third: The only other party interested in these appeals is this same American Water Works and Electric Company, appellant. This latter company is a creditor of the Great Shoshone and Twin Falls Water Power Company holding a claim for approximately \$1,268,434.66. It has never become a party to this litigation by intervention or otherwise. While the four attacking creditors were making their fight against this trust deed and supplemental mortgages in the lower court, the American Water Works and Electric Company, with full knowledge of the proceedings, did not join with the attacking creditors or aid them at all, but, instead seemed to have allied itself with the Equitable Trust Company of New York, complainant, under some sort of an arrangement by which its claim was to be taken care of in reorganization plans. Instead of aiding the four attacking creditors, its president, H. Hobart Porter, who was also president of the Great Shoshone and Twin Falls Water Power Company, sent a telegram in the midst of the trial to his attorney directing this attorney to file an answer on behalf of the Great Shoshone and Twin Falls Water Power Company admitting all the allegations of the bill of complaint and supplemental bill of complaint (Trans. 174-175). But after the decree of foreclosure had been entered and after the four attacking creditors, presuming that no other creditors intended to or could intervene, without re-

gard to the actual value of the property, had been allowed to enter into a stipulation that the value of the property upon which they had been adjudged prior liens was only \$45,000.00, the aggregate amount of their claims, and after the sale had been held, and after the motion for the confirmation of the sale had been heard, the American Water Works and Electric Company suddenly changed sides and sought to intervene in this action not for the purpose of attacking the lien of the mortgage as the other four creditors had done but for the sole and only purpose of pro-rating with the four attacking creditors in the fund which they had won for themselves, and thus to take from the four creditors ninety-six and one-half per cent of the fruits of their struggle. No satisfactory excuse was offered for its apparent laches nor could the court, under the circumstances, see any equity in its petition to intervene, and therefore its petition to intervene was denied. Thereupon the court ordered the Special Master to pay the four attacking creditors the amounts of their claims out of the funds in his hands for that purpose. The denial of its petition to intervene and the above order of the court relative to payment of the four attacking creditors claims constitute the grievances of the American Water Works and Electric Company.

The facts of the case stated more fully and in chronological order are these:

On November 2, 1914, Guy I. Towle filed a complaint in the United States District Court for the District of Idaho, Southern Division, against the



Great Shoshone and Twin Falls Water Power Company alleging that he was a creditor of that corporation; that the value of the property of the company if properly conserved and continuously operated was greatly in excess of the amount of its liabilities, but that owing to financial conditions it could not pay its debts as they became due and was being hard pressed by its creditors, and he asked for the appointment of a receiver (Trans. pp. 159-170). The company immediately appeared and, by answer, admitted the allegations of Towle's complaint and joined in the request for a receiver (Trans. pp. 173-174). Accordingly, on the same day, November 2, 1914, the Court appointed William T. Wallace receiver of the Great Shoshone and Twin Falls Water Power Company. (Trans. pp. 170-173). The order appointing the receiver forbid and enjoined any creditor or any one else from attaching, levying upon, or seizing any of the property of the Great Shoshone and Twin Falls Water Power Company (Trans. p. 172).

The Company was a public service corporation furnishing electricity to numerous towns in Southern Idaho.

On April 14, 1915, The Equitable Trust Company of New York commenced an entirely separate and distinct action in the above court and filed its complaint seeking to foreclose a deed of trust or mortgage dated May 1, 1910, and two supplemental mortgages given to secure an issue of bonds of the Great Shoshone and Twin Falls Water Power Company. The bond issue aggregated \$2,230,000.00. The Equitable Trust Com-

pany of New York named as defendants in this foreclosure suit the Great Shoshone and Twin Falls Water Power Company, the mortgagor; William T. Wallace, Receiver; Guy I. Towle, who had theretofore filed the complaint in the receivership suit; and Carl J. Hahn, as administrator of the estate of Harry M. King, deceased. The last named defendant was a judgment creditor of the Great Shoshone and Twin Falls Water Power Company whose judgment was on record (Trans. p. 26).

It should be noticed, that the Equitable Trust Company did not ask for the appointment of a receiver, nor did it ask that the receiver in the Towle case, theretofore brought, should be considered as taking possession or holding possession for the trustee or mortgagee.

The deed of trust, which is a mortgage under our Idaho statutes, and the supplemental mortgages sought to be foreclosed purported to cover all of the property of the mortgagor corporation, personal as well as real (Trans. p. 45). But the deed of trust and supplemental mortgages as shown by the complaint and as is admitted, lacked the affidavit of good faith on the part of the mortgagor without which a mortgage of personal property is void as against creditors under section 3408 of the Idaho Revised Codes reading as follows:

#### “AFFIDAVIT AND RECORD OF MORTGAGE.

Sec. 3408. A mortgage of personal property is void as against creditors of the mortgagor and subsequent

purchasers and incumbrances of the property in good faith and for value, unless:

First: It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.

Second: It is acknowledged or proven, as grants of real estate, and the mortgage, or a true copy thereof, is filed for record with the county recorder of the county where such property is located and kept."

Neither had the mortgage or a true copy thereof been filed for record or indexed as a mortgage of personal property with the county recorders of the counties where the property was located and kept, as a mortgage of personal property as required by the same section and section 3409 of the Idaho Revised Codes (Trans. pp. 175-176).

It later developed that some of the personalty of the Great Shoshone and Twin Falls Water Power Company such as generators, dynamos, switchboards, and tools and supplies necessary for the operation and maintenance of the system, constituted essential parts of the mortgagors' generating, transmitting, and distributing system and the lower court held that the above Idaho statutes relating to mortgages of personal property had no application to such classes of personalty. But, on the other hand, the trial court held that the Idaho chattel or personalty mortgage statutes did apply to such articles of personalty as did not form constituent parts of the mortgagor's system, or were not presently necessary for its maintenance or operation, such, for example, as

stocks of merchandise kept in its various stores which were intended for sale to the public in the ordinary course of retail trade, bank balances, accounts receivable, and tools, materials, and supplies in excess of present needs. (Trans. 185-187).

On May 4, 1915, the defendants, the Great Shoshone and Twin Falls Water Power Company and William T. Wallace, Receiver, filed separate appearances in the mortgage foreclosure suit brought by the Equitable Trust Company of New York, but made no answer to the bill of complaint.

It should be remembered that the deed of trust and supplemental mortgages, though not executed and recorded as required by law, were valid between the mortgagor and mortgagee as to all personal property attempted to be mortgaged, and also valid against all the world until attacked by some creditor.

On October 16, 1916, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and within the next few days thereafter, Jake M. Shank and Guy I. Towle proved their claims in the lower court in the receivership suit entitled Guy I. Towle, plaintiff, vs. Great Shoshone and Twin Falls Water Power Company, defendant, being equity suit No. 509 and being the same suit in which William T. Wallace was on November 2, 1914, appointed receiver, and each procured an order of the court setting forth that upon the hearing of their respective claims, it was admitted by the receiver appearing in person and by his attorney that the claims set forth by the respective claimants above



named appeared upon the books of the Great Shoshone and Twin Falls Water Power Company as valid and existing claims against that company, and thereupon the court duly and regularly allowed said claims in the sums as hereinafter set forth, to wit:

Guy I. Towle.....	\$13,963.01
Carl Hahn as administrator of the estate of Harry M. King, de- ceased .....	6,225.15
L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased .....	15,625.00
Jake M. Shank .....	4,390.00

(Trans. pp. 226-227).

Thereafter, on October 23, 1915, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank petitioned to intervene in this action on behalf of themselves only and to set up certain defenses relating to the form, execution, and recording of the deed of trust and supplemental mortgages, which defenses these interveners believed to be valid, and which they believed would entitle them to prior liens over the lien of the deed of trust and supplemental mortgages of the Equitable Trust Company of New York in certain personal property of the Great Shoshone and Twin Falls Water Power Company. Their petitions set forth that their claims had been duly and regularly approved and allowed in the receivership suit as above stated; that there was no other property excepting that sought to be held by the Equitable Trust Company of New York under its deed of trust and

supplemental mortgages out of which their claims could possibly be satisfied; that they were forbidden by the order of the court appointing the receiver from attacking that property; that they had exhausted their legal remedies and had procured the only thing in the nature of a judgment that it was possible for them to secure, and that unless they were allowed to intervene and have their claims settled out of this property their claims would be valueless (Trans. pp. 107-110, 131-134). The defenses sought to be interposed by the interveners, as already stated, were based on the fact that though the deed of trust and mortgages sought to be foreclosed purported to be mortgages of personal as well as real property, yet they did not have the affidavit of good faith made by mortgagor as required by the Idaho statutes nor were they filed or indexed as mortgages of personal property (Trans. pp. 109-110). The court allowed the intervention of the two above named claimants (Trans. pp. 111, 135). These two claimants then, together with two original defendants in the foreclosure suit, namely, Guy I. Towle, whose claim had likewise been duly approved and allowed in the receivership suit, and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, duly and regularly filed and served their separate answers in this foreclosure case, answering for themselves, respectively only and individually, each setting up the aforesaid defenses to the deed of trust and supplemental mortgages (Trans. 111-129, 135-139, 102-106).

On October 25, 1915, the cause came regularly on

for trial before the court sitting in Equity on the Bill of Complaint and Supplemental Bill of Complaint of the Equitable Trust Company of New York and the issues made thereon by the answers of Guy I. Towle and Carl J. Hahn as administrator of the estate of Harry M. King, deceased, defendants, and the answers of L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank, interveners (Trans. p. 141).

The Court overruled the motions of the Equitable Trust Company of New York to strike out the answer of Guy I. Towle, and to vacate the orders made by the Court theretofore on October 23, 1915, allowing L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, and Jake M. Shank to intervene and be made parties defendant in this cause, and to dismiss the petitions and to strike the answers of said interveners L. M. Plumer and E. B. Scull, executors, and Jake M. Shank (Trans. p. 141). The Equitable Trust Company of New York assigns these rulings of the lower court as error (Trans. 253-254, Specifications of Error 7-14).

Thereupon the allegations in the answers of these defendants and interveners were by agreement of counsel in open court deemed denied. (Trans. p. 141).

The receiver who was present in open court with his counsel had not up to this time, October 25, 1915, filed any answer nor indicated any desire or intention of doing so. Counsel for the Receiver stated to the court that the receiver took a neutral position in the

controversy between the Equitable Trust Company New York and the four attacking creditors, and for that reason he had filed no answer. The court then directed the receiver to prepare an answer and file the same by 10:00 A. M. of October 26, 1915. (Trans. 141-142).

The complainant then began introducing its testimony which was mainly in the form of depositions taken in New York City.

Albert E. Smith testified in his deposition that he was the treasurer of the National Securities Corporation; that the National Securities Corporation was the absolute owner of all the outstanding bonds of the Great Shoshone and Twin Falls Water Power Company, having purchased them in June, 1915, from a protective committee for holders of notes of the Great Shoshone and Twin Falls Water Power Company, which committee consisted of Alvin W. Krech, A. C. Robinson, A. M. Imbrie, and H. Hobart Porter. (Trans. 143-144).

The witness did not state how much had been paid for the bonds.

Samuel Armstrong testified that he was assistant secretary of the complainant; that the complainant had been requested to declare the bonds of the Great Shoshone and Twin Falls Water Power Company due and had been requested to foreclose the deed of trust and supplemental mortgages by instruments in writing signed by the then owners of the bonds. This was before the institution of the foreclosure proceedings in April, 1915. Among those who signed such written



request was the appellant, American Water Works and Electric Company by its president, H. Hobart Porter. (Trans. p. 150).

On October 26, 1915, the receiver, the defendant William T. Wallace filed his answer in this foreclosure suit. But he did not see fit to set up the defenses which the four attacking creditors in their respective answers had asserted, nor did he see fit, on behalf of the general creditors who appeared through him only, to attack the trust deed and supplemental mortgages of the Equitable Trust Company on the grounds set up by the four attacking creditors nor on any other grounds, nor did he, though present in open court at the trial with his attorney ever ask leave to amend his pleadings so as to set up there defenses to the trust deed and supplemental mortgages (Trans. pp. 81-87).

Before the Equitable Trust Company rested and closed its case, and upon the coming in of the court on the morning of October 27, 1915, Mr. P. B. Carter, an attorney at law, stated to the court that a telegram had come o his office at 3:50 P. M. of October 26, 1915, the evening before, from H. Hobart Porter, president of the Great Shoshone and Twin Falls Water Power Company, requesting him to file an answer in the case on behalf of the Great Shoshone and Twin Falls Water Power Company admitting all the allegations of the foreclosure bill and supplemental bill. Mr. Carter further stated that he had prepared an answer in pursuance of the telegram from H. Hobart Porter and desired leave to file the same. The court took the

application under advisement and suggested that the proposed answer be lodged with the clerk. The proposed answer read as follows:

“Comes now the defendant, the Great Shoshone and Twin Falls Water Power Company, one of the defendants in the above entitled action, and answering the bill of complaint and supplemental bill of complaint, admits each and every allegation of said bill of complaint and supplemental bill of complaint as therein set forth or specified.” (Trans. pp. 174-175).

H. Hobart Porter, who sent the above telegram directing his attorney to file this answer admitting all the allegations of the foreclosure bill and supplemental bill was at that time, and still is, the president of the appellant American Water Works and Electric Company. (Trans. pp. 150, 315).

The incident of the sending of this telegram by H. Hobart Porter, president of the American Water Works and Electric Company undoubtedly occupied a prominent place in the mind of the trial judge when considering the belated petition of the American Water Works and Electric Company to intervene in this cause. About two and one-half months after the trial, after the decree of foreclosure had been entered, after the sale had been held, and when the proceeds were about to be distributed, and after the four attacking creditors thinking no one else was interested had stipulated that the value of the particular property upon which they had been given a prior lien was only equal to the amount of their claims, to-wit, \$45,000.00, the American Water Works and Electric Company sought to

intervene and share pro rata with its claim of \$1,268,-434.66 with the four attacking creditors in the fund of \$45,000.00 which these four creditors had secured for themselves only. In the petition of the American Water Works and Electric Company to intervene presented on February 28, 1916, H. Hobart Porter, who verified the petition, in order to excuse its laches sought to give the court the impression that he did not know that any foreclosure proceedings were pending, or that any trial was being held or that any fight was being made by any creditors upon this deed of trust and supplemental mortgages. The American Water Works and Electric Company at that time owned no bonds of the Great Shoshone and Twin Falls Power Company but alleges that it held a claim against that company for \$1,268,434.66. By the language of its petition to intervene and proposed complaint the American Water Works and Electric Company further seemed to wish the lower court to infer that it would have united with the attacking creditors if it had but known what was going on. (Trans. p. 277, 279, Pars. 9 and 13). Facts already in the record and circumstances known to the court led Judge Dietrich to decide that H. Hobart Porter and the American Water Works and Electric Company had full knowledge of everything taking place in these foreclosure proceedings, and that instead of aiding the creditors attacking the mortgages and deed of trust, they had chosen to join hands with the Equitable Trust Company of New York in an effort to prevent the freeing of any of this personal

property from the lien of the deed of trust and supplemental mortgages (Trans. 302-310). This petition of the American Water Works and Electric Company to intervene and the facts surrounding it will be outlined later.

On defendants' and interveners' side of the case at the trial, Carl J. Hahn, on his own behalf, introduced a certified copy of his unpaid judgment against the Great Shoshone and Twin Falls Water Power Company. The Equitable Trust Company of New York, complainant, then admitted by its counsel in open court that the claims of Jake M. Shank in the sum of \$4390.00, of Guy I. Towle in the sum of \$13,963.01, and of L. M. Plumer and E. B. Scull, executors, in the sum of \$15,625.00 had been allowed and approved as claims against the Great Shoshone and Twin Falls Water Power Company in the receivership suit, and also admitted that their deed of trust and supplemental mortgages though purporting to cover personal as well as real property, had not been filed or recorded as mortgages of personal property, nor filed in the chattel mortgage records of the counties where the property was located and kept. (Trans. pp. 175-176).

And thus the trial ended. The court took the case under advisement and on November 17, 1915, rendered its decision. Only the second point discussed in the court's decision is material on this appeal. It reads as follows:



(Title of Court and Cause.)

Nov. 17, 1915.

In Equity No. 526

Decision.

Dietrich, District Judge:

Two general questions are presented: (1) For what amount is plaintiff entitled to foreclosure and (2) upon what property? \* \* \* \*

The second question arises out of the fact that the trust deed, which, under the laws of the state, is to be deemed a mortgage, is executed with the formalities only of a real estate mortgage, and is without certain requirements for, and is not recorded as, a chattel mortgage. By intervening creditors and by the receiver it is urged that as to the personal property which the instrument purports to cover, it is void; or perhaps, speaking more accurately, it is to that extent ineffective as against the claims of other creditors. In support of this view reliance is placed upon Section 3408 of the Idaho Revised Codes, which declares that: "A mortgage of personal property is void as against creditors of the mortgagor \* \* \* unless \* \* \* it is accompanied by the affidavit of the mortgagor that it is made in good faith," etc. Admittedly no such affidavit was attached to or accompanies the trust deed. Against this defense the first point raised by the plaintiff is, that neither the intervening creditors nor the receiver is competent to interpose it. The argument is that the receiver stands in the shoes of the debtor, and can make no defense unavailable to it, and that the instrument being undoubtedly valid as between the mortgagee and the mortgagor, is valid as between the mortgagee and the receiver. And further, that the intervening creditors having no judgment or other lien upon, or interest in, any of the property, are without standing as parties, and cannot be heard to

question the validity of the mortgage. It must be conceded that as a rule a general creditor without interest in or a lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage. But here, it is to be observed, a creditors' suit was brought long before the institution of the foreclosure suit, and a receiver was appointed therein to take charge of all of the mortgagor's property. In that suit the claims of these creditors were offered, allowed, and filed, as valid subsisting claims against the estate. In *Chemical National Bank vs. Armstrong*, 59 Fed. 372, 375, where a receiver had been appointed to take charge of the assets of an insolvent bank, Judge Taft, delivering the opinion of the court, said:

"It is manifest that it would utterly defeat the object of the banking act if, after the suspension, the assets remained subject to levy, execution, or attachment and, therefore, that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. *Bank v. Colby*, 21 Wall. 609.

"The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed."

Referring to this case, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, in *Merrill v. Bank*, 173 U. S. 131, 136, said:

"This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Chemical National Bank v. Armstrong*, 16 U. S. App. 465, Mr. Justice Brown, Circuit

Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund."

Recognizing the same principle, the Supreme Court of California, in *Ruggles v. Cannedy*, 127 Cal. 290, gave it specific application to conditions analogous to those here presented. It is there said:

"In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment by force of the insolvency act itself, they were prevented from restoring to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became *res adjudicata*. The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (*Roan v. Winn*, 93 Mo. 503)."

Only by giving effect to such principle can great injustice be avoided, for otherwise, at the suggestion and with the encouragement of the trustee, a general creditor could bring such a suit as was here brought, and secure the



question the validity of the mortgage. It must be conceded that as a rule a general creditor without interest in or a lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage. But here, it is to be observed, a creditors' suit was brought long before the institution of the foreclosure suit, and a receiver was appointed therein to take charge of all of the mortgagor's property. In that suit the claims of these creditors were offered, allowed, and filed, as valid subsisting claims against the estate. In *Chemical National Bank vs. Armstrong*, 59 Fed. 372, 375, where a receiver had been appointed to take charge of the assets of an insolvent bank, Judge Taft, delivering the opinion of the court, said:

"It is manifest that it would utterly defeat the object of the banking act if, after the suspension, the assets remained subject to levy, execution, or attachment and, therefore, that the passing of the assets into the hands of the receiver removes all the property of the bank from liability to process to secure satisfaction of judgments. *Bank v. Colby*, 21 Wall. 609.

"The right which a creditor of the bank had before suspension of levying an execution to satisfy his judgment is gone, and for it is substituted a fixed and definite interest in the assets as a security for the payment of his debt, which it is the purpose of the banking act to reduce to money, and apply on his debt, with all convenient speed."

Referring to this case, the Supreme Court of the United States, speaking through Mr. Chief Justice Fuller, in *Merrill v. Bank*, 173 U. S. 131, 136, said:

"This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Chemical National Bank v. Armstrong*, 16 U. S. App. 465, Mr. Justice Brown, Circuit



Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund."

Recognizing the same principle, the Supreme Court of California, in *Ruggles v. Cannedy*, 127 Cal. 290, gave it specific application to conditions analogous to those here presented. It is there said:

"In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment by force of the insolvency act itself, they were prevented from restoring to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became *res adjudicata*. The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (*Roan v. Winn*, 93 Mo. 503)."

Only by giving effect to such principle can great injustice be avoided, for otherwise, at the suggestion and with the encouragement of the trustee, a general creditor could bring such a suit as was here brought, and secure the

appointment of a receiver,, and the property having thus been placed in *custodia legis*, other general creditors would be prevented from acquiring specific liens thereon through the levy of attachment or execution process, with the result that they would be disabled from attacking an invalid mortgage, while the trustee, taking advantage of their disability, could rest secure until, upon the maturity of its right to foreclose, it could appropriate the entire property to the discharge of its claim, notwithstanding the defect in its mortgage. It will therefore be held that the creditors were properly permitted to intervene, and that they have an interest which entitles them to challenge the mortgage.

The further contention is made by the trustee that the provisions of the chattel mortgage statutes of the state are not applicable to property such as is here involved, for the reason that while some of it, considered separately, falls within the definition of personal property, it is all to be deemed a single indissoluble unit because of its necessary relation to the public purpose to which it is devoted. Within certain limits the view finds support in *Hammock v. Farmers Loan & Trust Co.*, 105 U. S. 77, and *Farmers Loan & Trust Co. v. Detroit, etc. R. R. Co.*, 71 Fed. 29 See also *Jones on Corporate Bonds and Mortgages*, (3d Ed.) Section 1377 et seq. While this is not a railroad property, it is devoted to the public service, and I am inclined to think is subject to the same considerations which were regarded as controlling in these cases; in the absence of a decision of the Supreme Court of the state to the contrary I shall therefore apply the principle which they establish to the determination of the issue here. It may be added that the decisions of the state courts, where there are no controlling statutes, are wanting in

harmony, with the weight probably against the view here adopted.

Complying with the suggestion made at the hearing, counsel for the intervenors have incorporated in their brief a schedule in which specifically or generally they have inventoried what they deem to be personal property. By Section 3054 of the Idaho Revised Codes, real property or real estate is defined as embracing lands, mining claims, possessory rights to lands, ditch and water rights, and everything affixed or appurtenant to lands. Under this definition it is not apparent how the several water rights included in the list can be held to be personal property. But however that may be, they clearly fall within the principle of the Hammock case. So also do franchises, and such items as generators, dynamos, switch boards, and other articles of equipment constituting essential parts of the mortgagor's generating, transmitting, and distributing system; also tools, implements, and materials, teams and conveyances, presently necessary for the maintenance, repair, and operation of the system.

The principle, however, does not extend to supplies, materials, and tools in excess of present needs; to bills or accounts receivable; to cash on hand or bank balances; to stocks of merchandise which are intended for sale to the public in the ordinary course of retail business; and apparently not to the capital stock of the Jerome Water Works Company, or to the public ferry at Shoshone Falls; nor, generally speaking, to such articles of personalty as do not form constituent parts of the system, or are not presently necessary to its maintenance and operation—as to all of which the claims of the intervenors will be recognized as being superior to the lien of the mortgage. The other property will be sold as a single parcel, but these items upon which it is held the creditors have a su-



perior lien will be sold separately. Either party may, upon notice, introduce further evidence, at a date to be stated in the notice, prior to December 10, 1915, for the purpose of more completely identifying the property embraced in this latter class." (Trans. pp. 177, 181-187).

In accordance with the views expressed in the decision, a decree of foreclosure was entered on December 6, 1915, declaring that the lien of the deed of trust and supplemental mortgages was subject and subordinate to the claims of the four creditors who had attacked this trust deed and supplemental mortgages in the foreclosure suit "as to all such articles of personalty as do not form a constituent part of and are not presently necessary for the maintenance, repair, and operation of the hydro electric generating, transmitting, and distributing systems of the Power Company or reasonably necessary in conducting its business as a public service corporation, such personalty consisting of construction supplies and materials in excess of the present needs of the Power Company in conducting its business, and of bills and accounts receivable, stocks of merchandise which are intended for sale to the public in the ordinary course of retail business, the public ferry at Shoshone Falls, and stock owned by the Power Company in other Corporations." (Second Paragraph Decree, Trans. pp. 191-192).

It had been stipulated that all the property of the debtor company might be sold as a single parcel and the Decree so provided (Trans. pp. 187-188, 196).



After the decree had been entered and before the sale, the question arose as to how should be determined the value of the particular personal property upon which the four attacking creditors had been decreed to have liens superior to that of the mortgagee. It appeared that the claims of the four attacking creditors aggregated approximately \$41,000.00 and it further appearing that \$45,000.00 would be sufficient to pay their claims with interest, they entered into a stipulation on December 24, 1915, with the Equitable Trust Company of New York to the effect that the property upon which they were adjudged to have claims prior and superior to the lien of the Equitable Trust Company of New York was of the reasonable value of \$45,000.00 (Trans. pp. 210-212), and an order of the court was on December 27, 1915, made that \$45,000.00 of the proceeds of the sale of the mortgagors property should be placed in the separate fund mentioned in the Decree to pay the claims of the four attacking creditors.. (Trans. pp. 212-213).

On January 8, 1916, all the property of the Great Shoshone and Twin Falls Water Power Company was sold at public sale under the decree of foreclosure and bid in for the sum of \$2,000,000.00, the upset price theretofore fixed by the court. (Trans. pp. 215, 216).

On February 14, 1916, the motion for confirmation of the sale came on for hearing and an order was thereafter made confirming the sale. (Trans. pp. 215-223).

On the same day, February 14, 1916, the American Water Works and Electric Company, appellant, for the first time appeared in court, professing ignorance of what had been happening theretofore in the cause, and petitioned to intervene in this foreclosure suit, not for the purpose of attacking the deed of trust or supplemental mortgages nor for the purpose of wresting any more property from the mortgagee nor for the purpose of establishing that the lien of the deed of trust and supplemental mortgages was subordinate to their claim, but for the sole purpose of depriving the four attacking creditors of the fruits of their litigation and of pro-rating with these four creditors in the fund of \$45,000.00, which the court had by its decree of December 6, 1915, declared should be paid over to the four creditors who had made the attack upon the deed of trust and supplemental mortgages. The alleged claim of the American Water Works and Electric Company amounted to \$1,268,434.66; the aggregate of the claims of the four attacking creditors amounted approximately to \$41,000.00. Thus, under its proposed pro-rating plan, the American Water Works and Electric Company sought to obtain for itself about ninety-six and one-half per cent of the fund which the four attacking creditors had won as the result of their diligent efforts. (Trans. 270-285).

After argument upon this petition of the American Water Works and Electric Company to intervene the Court suggested that, without full consideration of the rights of the applicant, its petition

would be denied in the form in which it was then presented, and further that the application would again be entertained upon a showing touching the diligence of the applicant, and an explanation of its apparent laches in seeking to intervene at such a late date when its president and officers must have known of the pendency of the foreclosure suit since its inception in April, 1915, and upon a further showing concerning the ownership of its claim and the interests, direct and indirect, which the parties to the litigation had and had had therein, and an explanation as to why it was it had not aided but had rather obstructed the four attacking creditors in their efforts to establish a lien superior to the lien of the deed of trust and supplemental mortgages. (Tr. p. 303).

Thereafter the American Water Works and Electric Company amended its petition to intervene and the same came on for hearing on the 28th day of February, 1916. At the same time was also heard the petition of the four attacking creditors for an order upon the special master in chancery to pay to them the amounts of their respective claims out of the funds in his hands under the decree, derived from the sale of the particular personal property upon which it had been decreed that these creditors had claims or liens superior to that of the deed of the funds in his hands under the decree. (Tr. p. 240).

The court granted the petition of the four attacking creditors and made an order directing the special master to pay the four creditors their claims out of

the funds in his hands under the decree .(Tr. p. 240).

At the same time, Feb. 28, 1916, the court denied the petition of the American Water Works and Electric Company to intervene. Thus the American Water Works and Electric Company never became a party to this foreclosure suit. On the same day the court wrote a memorandum decision giving its reasons for not allowing the American Water Works and Electric Company to intervene. The sum and substance of the reasons given by the court is that the petition of the American Water Works and Electric Company to intervene failed to show any equitable grounds upon which it should be allowed to intervene. The memorandum decision is as follows:

(TITLE OF COURT AND CAUSE).

“The interveners to whom a prior lien was awarded by the decree present an application for an order requiring the purchaser at the sale to pay into the hands of the special master a sufficient additional amount to cover their claims, and for a further order directing the Master to pay the claims in full.

On the 14th day of February, the American Water Works and Electric Company, through its counsel, Messrs. Wyman & Wyman, presented an application to intervene, for the purpose of resisting payment to the interveners, and after argument the suggestion was made from the bench that without full consideration of the rights of the applicant its petition would be denied in the form in which it was then presented,



and further that the application would again be entertained upon a showing touching the diligence of the applicant, and especially touching the ownership of the claim, and the interests, direct and indirect which parties to the litigation have and have had therein. It seems that no time was fixed for making such showing, but upon notice from the interveners that they would present the application herein referred to upon this day, it was suggested to counsel for the American Water Works and Electric Company that in order to avoid delay it might present its amended petition to intervene at the time fixed for the interveners' application, and that if the same could not be verified before such time, the verification might be made later and be considered as having been made as of this day. Accordingly the unverified amended petition has been submitted and is entertained, together with the intervener's application. A decision was announced from the bench at the close of the argument, granting the application of the petitioners and denying that of the American Water Works and Electric Company, and the views expressed at the former hearing and at the close of the argument today are hereinafter set forth with some amplification, in order that they may be of record.

Admittedly the interveners are entitled to the relief prayed for, unless the American Water Works and Electric Company, hereinafter called the petitioner, is entitled to intervene, and to take from them substantially all of the fruits of their litigation. It did not seek to intervene until the hour set

for the confirmation of the sale, at which time but for its appearance it would have been proper to make the order for which the interveners now pray. In view of the lateness of the application and the impression I had received in the course of the administration of the estate that there was a community of interest, if not a common ownership, as between the holder of all of the bonds and the holder of this claim, it was thought proper to require the petitioner to make a prima facie case showing that it was not guilty of laches, and that it had not been co-operating with the plaintiff in the action in resisting the relief granted to the interveners. While in the decision today I have placed special emphasis upon another consideration, the showing made by the amended petition upon the point suggested is not very satisfactory. The petitioner might be the technical owner of the claim, and yet all of the stock might be held by the owner of the bonds, and hence I before suggested that in explaining the ownership of the claim the ownership of the stock of the petitioner should also be disclosed. It appears from the record in the case that during the entire time of the pendency of the foreclosure suit all the bonds were held by the National Securities Corporation, and it now appears from the amended petition that there was some sort of an arrangement between that company and the petitioner for the purchase of this claim. In view of the record in the receivership and in this case, it is thought to be incumbent upon the petitioner, before it can ask the court to exercise a

liberal discretion in its favor, fully and frankly to negative the proposition that it stood with the holders of the bonds in the attempt to defeat the interveners in procuring the relief, whereas now it seeks to appropriate to itself substantially all that they have succeeded in wresting from the bondholders, at their own expense and peril.

But be that as it may, I have been unable to see any substantial ground upon which the right of the petitioner to intervene may be predicated. When the matter was first presented to me on the 14th of February I had the impression that while it would not be permitted to intervene to share pro rata in the decree, the intervention might be allowed for another purpose. To explain, there is a fund, the precise amount of which has not yet been determined, in the hands of the receiver in the creditors' suit, which presumably will ultimately be distributed to the unsecured creditors, including the interveners and the petitioner,—and also the plaintiff trustee for such deficiency judgment as may be awarded to it after applying the proceeds of the sale to the liquidation of its claim. My thought was that by paying the \$45,000.00 to the intervenors the proceeds of the sale would be diminished by that amount, and therefore the deficiency judgment would be correspondingly increased, and the aggregate of the unsecured claims entitled to share in the receivership fund would be equally increased, and thus the petitioner would receive a smaller dividend than would have been distributed to it if the interveners had stayed



out of this suit. It occurred to me that perhaps it could be properly held,—although that seemed extremely doubtful,—that a duty rested especially upon Towle, the plaintiff in that action, and possibly upon other interveners, not to do anything even in another suit by which they would be benefited to the disadvantage of other creditors. But whether such was or was not their duty, upon reflection it now appears clear to me that the petitioner would not suffer the slightest prejudice even in this respect. Indeed it is practically conceded by counsel that the petitioner's position is precisely the same, and the share it will receive out of the funds in the hands of the receiver is precisely the same, that it would have been had the interveners never come into the foreclosure suit. The aggregate of the claims to participate in the distribution of that fund will not be increased, because in so far as the deficiency judgment is increased the claims of these interveners will be diminished. So that the aggregate will remain precisely the same. Even if therefore it be assumed that for some reason not made clear the interveners owed the petitioner the duty to take no action which would prejudicially affect its distributive share in the receivership fund, it cannot invoke the principle of equitable estoppel here as a ground for intervening, because admittedly it has suffered and will suffer no injury. The intervenors have done nothing against good conscience or to the prejudice of the petitioner in securing and appropriating to their own use the judgment in the foreclosure case. They were under



no contractual obligations to the petitioner, and I am unable to perceive how it can be held that they have violated any duty or obligation in seeking payment of their claims out of a fund which in whole would have otherwise have gone to the bondholders, and not at all to the unsecured creditors. The judgment is entirely the fruit of their diligence, in the exercise of which they took nothing from the petitioner. The petitioner had the same right as they to come into the suit, of the pendency of which it undoubtedly had knowledge. If it did not join hands with the plaintiff to defeat the interveners, still having knowledge of the pendency of the foreclosure suit, and presumably being advised of its legal rights, it chose to remain silent and inactive, thus avoiding the expense and peril of litigation, until after these intervenors have succeeded, and then, when they are about to receive the fruits of their diligence, it seeks to step in and seize the same. It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the payment of the bonds, it never lifted a finger in resistance, or suggested that the receiver do so.

The record does not disclose what the real value of the property is upon which the intervenors were awarded a first lien; it may have been very much in excess of the aggregate of their claims. They entered into a stipulation with the plaintiff, agreeing upon a value which was sufficient, but only sufficient, to take care of their claims in full. Had it been known

that other creditors would seek to share in such lien it is possible that a much greater value could have been established, but so far as appears the petitioner gave no notice of its intention to assert the present claim until after such stipulation had been entered into. It is further suggested that the receiver might have asserted for all creditors the rights which the court recognized in the intervenors. It is extremely doubtful to say the least, whether the receiver could have secured a footing to assert such rights, even upon behalf of the intervenors whose claims had been allowed in the general creditors' suit. But while the petitioners' claim had been presented, it had never been passed upon or allowed, and it may be questioned therefore whether it fell within the principle of law upon which the recognition of the intervenors' lien in the foreclosure suit was predicated. The trustee earnestly contended that before any one could attack the validity of the chattel mortgage upon the ground relied upon by the intervenors they must show some interest in or lien upon the property; and such undoubtedly is the general rule. How could the receiver have shown such interest in or lien upon the property in behalf of the petitioner? However that may be, upon an examination of the receiver's answer and of the proofs it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor of the petitioner or any other creditors. Proofs of the existence and status of claims were offered only by the intervenors and only touching their claims. The

court had no basis upon which to declare a lien in favor of the petitioner."

(Signed) DIETRICH, Judge.

(Record, 302-309.)

The appeals herein prosecuted by the Equitable Trust Company of New York and the American Water Works and Electric Company are, of course, separate appeals and raise entirely separate points, but the records have all been made up together and bound in one volume to save expense and for convenience.

The substance of the assignments of error set forth by the Equitable Trust Company of New York is that the court erred in holding and deciding that the lien of their trust deed and supplemental mortgages was inferior and subordinate to the claims and liens of the four attacking creditors in any property whatsoever, and also erred in allowing the two intervening creditors to intervene and attack the deed of trust and supplemental mortgages.

The substance of the assignments of error set forth by the American Water Works and Electric Company is that the court erred in denying its petition to intervene in the foreclosure suit and pro rata with the four attacking creditors in the foreclosure suit in the fund realized from the sale under the decree in the foreclosure suit, which fund, under the decree, was to be used to pay the prior lien claims of these four specified attacking creditors.

The American Water Works and Electric Com-

pany does not appeal from the decree of foreclosure.

The receiver does not appeal from the decree of foreclosure or from any order and is not complaining of the rulings of the trial court in any way.

# POINTING OUT ERRORS IN THE STATEMENT OF THE APPELLANT, THE EQUITABLE TRUST COMPANY OF NEW YORK.

There are so many palpably erroneous statements made in the statement of the Equitable Trust Company of New York, that we call attention to the following inaccuracies in its statement in order that a wrong impression may not be caused thereby:

(1) In its brief, on page 7, it asserts that the four prior lien claimants or attacking creditors proved their claims, **ex parte**. This is erroneous. Both the receiver and his counsel were present, and had to admit to the court that the claims set forth by these claimants were true and correct and were valid obligations of the Great Shoshone and Twin Falls Water Power Company. The court thereupon duly allowed these claims in the form of judgments. They were practically the same as judgments and had it not been for the operation of the law the claimants would have been entitled to judgments in name as well as in form.

(See order allowing claim of executors of estate of L. L. McClelland, deceased, Tr. p. 340).

(See order allowing claim of Jake M. Shank. Tr. p. 341).



(See order allowing claim of Guy I. Towle. Tr. p. 342).

The Equitable Trust Company did not make any objection in the trial court to the amount of any of the claims of these four claimants and did not object to the manner of proof and has never objected upon these grounds.

(2) On p. 8 of its brief it is stated that "The motions of the trustee to vacate the order permitting the interveners to intervene and to strike the answers of said interveners and of defendant Guy I. Towle were overruled by the court and the cause came on for trial upon the bill of complaint and supplemental bill and amended bill, and the answers referred to **and the answer** of the receiver. (Rec. 81).

This is erroneous. When the cause came on for trial, the receiver had filed no answer whatever. He was in default and his counsel stated to the court that he had prepared no answer and then, although these four creditors had filed their answers, and served the same on the receiver, setting forth valid points upon which the claimants were given liens on certain personalty prior to the lien of the deed of trust and supplemental mortgages, the receiver did not join any issues whatever in his answer, and either did not want to, that is refused, or neglected to raise the issues set up by these four claimants in their answers.

(Rec. 81-87.)

(3) Five lines from the bottom on page 8 of its brief it states:

“On October 27, 1915, during the trial of the cause, the defendant power company lodged its answer admitting all the allegations of the bill and supplemental bill. During the trial the interveners, Jake M. Shank, L. M. Plumer and E. B. Scull, and the defendants, Carl J. Hahn, Guy I. Towle and the **receiver** of the power company made the same objections relative to the recordation and execution of the deed of trust and supplemental mortgages and denied that the trustee had a prior lien on certain personal property of the power company.”

This is erroneous. It made this statement on a sentence taken from Judge Dietrich's first decision, but Judge Dietrich corrected this statement in his last decision Tr. p. 309, where he says: “However that may be, upon examination of the receiver's answer and of the proofs it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor of the petitioner (Am W. W. & Elec. Co.) or any other creditors.”

(4) On p. 11 of its brief it states: (7 lines from top of page).

“The court denied the right of the receiver, as the representative of all the creditors of the Power Company to make the contest made by the particular creditors above named.”

This is erroneous. The court did not deny any such right. Even after the way was pointed out to the receiver, and before the receiver had filed his answer, the receiver did not attempt to assert any rights for any creditors. The court had to direct the receiver to file an answer and when the receiver did file the

answer, he raised no issues, although the way had been shown him by which he could have raised the same issues as raised by these four creditors.

(5) On p. 11 of its brief it states: (11 lines from top of page).

“That the court held that the general creditors who had been allowed to intervene in the foreclosure suit had, by virtue of the general creditor’s suit and the filing of their claims in that suit obtained a sufficient interest in the property covered by the mortgage to entitle them to contest the priority of the lien thereof, and a status superior to that of the receiver who was in possession of the property as a representative of all the creditors.”

This is erroneous. The court held, that where the receiver had failed and neglected to assert any rights on behalf of creditors at all in the foreclosure suit, though made a defendant by the trustee in the foreclosure suit, and where the receiver had failed and neglected to file any answer at all in the foreclosure suit and had become in default in that suit, that the creditors who had presented their claims in the creditors’ suit and had proved their claims in the creditors’ suit and whose claims had been allowed in the creditors’ suit, could intervene in the foreclosure suit and attack the lien of the deed of trust.

(6) On page 11 of its brief it states: (middle of page).

“The effect of the Court’s ruling was to convert a general creditors’ suit wherein equality and pro rata distribution as between creditors

obtained, into a contrivance by which certain creditors could obtain a preference and priority over the receiver and all other creditors.”

This is erroneous. The effect of the ruling of the court upon the general creditors’ suit was not to change the general creditors’ suit in any manner, shape or form, and nothing whatever was taken from the creditors in the general creditors’ suit which they would otherwise have gotten.

The lien of the mortgage was good as between the bond holders and the debtor corporation. So in the foreclosure suit, the trustee would have taken all the property for the satisfaction of the lien.

But four creditors from the general creditors’ suit saw an opportunity at the last moment, after the receiver had failed and neglected to represent them, to intervene in the foreclosure suit, an entirely different and distinct suit, and wrest from the mortgagee certain property which otherwise would have gone to the mortgagee, not to the general creditors in the receivership suit.

(7) On page 11 of its brief it states: (last par. on page).

“The contention of the trustee complainant in the foreclosure suit, was (1)..... and (2) “that if the mortgage was subject to attack for the reasons stated above, the contest should be made by the receiver as representative of all creditors, and the property, or the proceeds thereof, should be turned over to the receiver in the general creditors’ suit for equitable distribution.”



The above statement is not only absolutely false but it is directly contrary to the position taken by this appellant in the trial court.

Judge Dietrich states in his opinion on page 182 of the transcript: "Against this defense the first point raised by plaintiff is, that neither the intervening creditors **nor the receiver** is competent to interpose it. The argument is that the receiver stands in the shoes of the debtor, and can make no defense unavailable to it, and that the instrument being undoubtedly valid as between the mortgagee and the mortgagor, is valid as between the mortgagee and the receiver."

The appellant surely cannot be allowed to argue and cite authorities to the trial court and urge the trial court to take certain action and then take a contrary view and argue directly contrary in the appellate court and urge a reversal upon a ruling of the court which was counselled, urged and advised by this same appellant.

And as to that part of the statement that the property or the proceeds upon which these four creditors obtained a prior lien should have been turned over to the receiver for distribution in the general creditors' suit, there was no such request made of the trial court. The receiver raised no issues in his answer and made no such request and now, is not attempting to appeal from the decree.

The complainant did not make any such request and only had a general denial entered as to the new matter in the answers of the four claimants. So, on

this appeal, for the first time, do we hear this request and coming not from the receiver, (the receiver is not complaining, not from a creditor, represented as being so numerous, but from the complainant on the theory that it has a deficiency judgment, when as a matter of fact it has no deficiency judgment and has waived its assignment of error on that point. (Tr. p. 176).

It is significant that this appellant does not refer to any page of the record as a basis for this statement.

(8) On page 12 of its brief it states:

“In the latter event, the trustee would be entitled to its share of the proceeds, based on its deficiency.”

This is erroneous and misleading. The trustee waived its deficiency judgment in this case and waived its assignment of error concerning the same. (Tr. p. 176 and 254). Furthermore, this appellant has no deficiency judgment in this case, and its argument to the effect that it would be entitled to pro rate in the general creditors' suit based upon the amount of its deficiency judgment falls flat when this fact appears.

All this appellant is trying to do is to obtain the right of the American Water Works and Electric Company to pro rate, and all its talk about pro-rating with its deficiency is misleading unless it is remembered that this appellant has no deficiency judgment and is simply using the word, misleading though it is, as an excuse for arguing in favor of pro-

rating, having in mind the claim of its ally the American Water Works and Electric Company.

On page 12 of its brief the appellant states:

“The following facts are not in dispute:

(1) \* \* \* \* \*

(2) “That all parties to this cause, excepting, of course, the Power Company and its receiver, have filed their claims with the receiver in the general creditors’ suit commenced by Guy I. Towle.”

This is erroneous. The complainant, the Equitable Trust Company, has filed no claim with the receiver for a deficiency judgment. It has no deficiency judgment. It failed in its proof so that it was not entitled to a deficiency judgment. It waived its claim for a deficiency judgment. The decree provided for no deficiency judgment. The appellant waived its assignment of error on this point as to a deficiency judgment. (Record p. 176-254).

# CONCERNING ASSIGNMENTS OF ERROR OF THE APPELLANT EQUITABLE TRUST COMPANY OF NEW YORK, AS SET FORTH IN ITS BRIEF.

In the transcript, this appellant sets forth fifteen (15) assignments of error, but in the brief this appellant has only six (6), having abandoned nine (9) of their original assignments, and from a perusal of the six (6) now stated anew, it seems that the appellant is attempting to raise points never raised by it before and is attempting to make a point out of the assignment that it should have been allowed to pro

rate in the general creditors' suit with its deficiency from the foreclosure suit, when as a matter of fact it has no deficiency judgment, having failed in its proof so that it was not entitled to a deficiency judgment, and having expressly waived its assignment of error based on its claim for a deficiency judgment. (Tr. p. 176 and 254), and these six assignments of error as now set forth anew in their brief are distorted and some of them not substantially in the form presented to the trial court, for instance, in its first general assignment of error as contained in its brief on p. 13 it says: "1. That the court erred in decreeing that the lien of appellants' mortgage was subject and subordinate to the claims of general creditors, as to certain personal property." This is misleading, in that the trial court did not hold that the lien of appellants' mortgage was subject to claims of general creditors. On the contrary, the court held "that as a rule a general creditor without interest in or lien upon mortgaged property cannot intervene in a foreclosure suit or challenge the sufficiency of the mortgage." (Record 182). But that these particular creditors under the particular circumstances of this case "were properly permitted to intervene and that they have an interest which entitles them to challenge the mortgage." (Record 185).

The general assignment of error No. 3 on p. 13 of its brief is misleading in that the court would perhaps infer from its language that this appellant had a deficiency judgment, whereas in truth and in fact it has no deficiency judgment and has filed no claim



for a deficiency judgment in the receivership proceedings though the time for the filing of claims against the debtor company has long since passed, and moreover, appellant has waived its assignment of error number 15, Record pages 176 and 254, which assignment of error was to the effect that the court erred in not rendering judgment in its favor for a specific sum of money. Appellant has waived its right to a deficiency judgment.

In setting forth its general assignment of error No. 4, as shown in its brief on page 14, it fails to call the court's attention to the fact that it waived its assignment of error No. 15 and thereby waived its right to participate in a distribution of the assets of the insolvent debtor, in the receivership suit.

ARGUMENT AND ANSWER TO POINTS AND  
AUTHORITIES OF THE APPELLANT,  
EQUITABLE TRUST COMPANY  
OF NEW YORK.

As to this appellants' **first** point, these appellees say:

That the court did not make any such holding as the one attributed to it by this appellant. The trial court did not hold "that the appointment of a receiver in a general creditors' suit operated to give to creditors filing their claims with such receiver a lien upon the property of the debtor," nor did it hold the reverse of this proposition. The court made no holding upon this proposition. But, instead, the court held that when a creditor petitioned to come into a

foreclosure suit showing that its claim was liquidated; that its debtor was insolvent; that the property covered by the mortgage was the only property out of which the debt could be paid; that the mortgagee was going to take it all to satisfy his claim and that the mortgage was void as to the intervener because not executed and filed as required by law; that the creditor had exhausted all of its legal remedies; and unless it was permitted to intervene, its claim would be rendered absolutely valueless, then, such creditor had such an **interest** in the foreclosure action as would permit the creditor to intervene. All this appeared from the petition for leave to intervene of the intervening creditors. (Record pp. 107 to 110) and from the bill of complaint. This was a proper holding under the Idaho statutes as construed by the Supreme Court of the State of Idaho.

See Idaho Revised Codes, Sections 4111 and 3418.

Newstadter Bros. vs. Doust, 13 Idaho 617, 92 Pac. 978.

And particularly Union Trust, etc. Bank vs. Idaho Smelting and Refining Co., defendants and respondents, and Title Guaranty & Security Co., intervener and appellant. 24 Idaho 735, 135 Pac. 832.

The appellees modelled their petition for leave to intervene upon the instructions given by the Supreme Court of Idaho in the last case above mentioned. The case was one in which a creditor was seeking to show that interest required by the statute

of the State of Idaho necessary to permit such creditor to intervene in a foreclosure action, and we submit that these intervening creditors brought themselves within the statute of the State of Idaho as construed by the Supreme Court of Idaho in the above entitled case. Counsel for appellant carefully refrained from mentioning this case in its brief though the same is controlling upon this matter of the interest a creditor must show and the circumstances which must exist to be entitled to intervene in a foreclose action.

This case decided by a unanimous court in October, 1913, declares the following to be the law of the State of Idaho:

“After the intervener had first shown the existence of its claim” (We did this in the case at bar, Record p. 107-108,) “and it had exhausted all of its large remedies” (We did this in the case at bar. Rec. bottom p. 108, top of p. 109), “or that those remedies were useless and it would be vain to pursue them” (We showed this in the case at bar. Rec. p. 109.) “and that the only way it could secure and collect its claim would be out of the property covered by this mortgage.” (We showed this in our petition to intervene. See pars. 4 and 6 Record pp. 109, 110). “Then it would have been in a position to contest the validity of a mortgage, and to raise the question as to whether or not these bonds had been issued and this mortgage had been executed in violation of the provisions of the Constitution of this State or of the State of Washington where this corporation was organized and exists.”

As to this appellants second point. Set out on p. 17 of its brief these appellees say: This point has no ma-

terial bearing upon the argument in this case as the statutes and decisions of the State of Idaho do not give the receiver any rights which the Federal Courts are bound to follow in this case.

As pointed out by the case of Union Trust etc. Bank vs. Idaho Smelting & Refining Co. et al, supra, these intervening creditors had the right to intervene in a foreclosure action in Idaho, under the Idaho Statutes, regardless of whether or not a receiver had such right, and even where a receiver had not been appointed.

Appellant seeks to place us in a faulty position, and in one that we have not taken, by continually saying that we based our right to intervene upon the lien caused by the appointment of the receiver in the creditors' suit, or by virtue of the receivership proceedings.

This is erroneous. We had the right to intervene and contest the validity of this mortgage, in Idaho, under the circumstances as shown to exist by our petition to intervene. (See Record pp. 107 to 110). And the fact that a receiver had been appointed was just one of the conditions which were alleged, in the petition for leave to intervene, for the purpose of showing that our legal remedies had been exhausted.

The case of Union Trust, etc. Bank vs. Idaho Smelting & Refining Co., supra, is decisive of this point in Idaho in our favor and this is undoubtedly the reason why appellants' counsel does not mention this case in his brief.



See also *Ruggles vs. Cannedy*, 127 Cal., 290, 53 Pac. 912.

As to point, No. 3 in appellants' points and authorities on p. 17 of its brief, these appellees say:

This point as set forth by appellant does not correctly state the law of Idaho. The statute is very simple and reads as follows: "Sec. 3408. A mortgage of personal property is void as against creditors of the mortgagor \* \* \* \* \* unless:

1st: It is accompanied by the affidavit, etc.

2d: It is acknowledged, etc."

The statute does not say that such a mortgage is valid as to all creditors excepting those having a lien upon the property by attachment or some process, as appellant asserts and the decisions of Idaho do not bear him out in this contention but the decisions of Idaho absolutely refute such contentions.

An interest in the matter in litigation and not a lien is the test in Idaho.

*Neustadter Brothers vs. Doust*, 13 Idaho, 617, 92 Pac. 978, when read with *Union Trust, etc. Bank vs. Idaho Smelting & Refining Co.*, 24 Idaho 735, 135 Pac. 832, shows this to be true. *Neustadter Bros. vs. Doust* when read with the above case shows that the **interest** referred to, in sections 3418 and 4111 Idaho Revised Codes, does not have to be a **lien** in every case. If the conditions of the particular case are such that the creditor has the equivalent of a judgment or was prevented from having a judgment or lien through no fault of his own, or was entitled to a judgment or

lien for some obstacle over which the creditor had no control, then the creditor will be held in Idaho to have such an **interest** in the subject matter of the litigation as to be entitled to intervene.

*Newstadter Brothers vs. Doust*, supra, was an action by a general creditor for an injunction against the sheriff brought under a particular statute providing for injunctions in such cases to restrain him from selling certain personal property under affidavit and notice for the sale of such property under a chattel mortgage, and was not an action where a creditor was seeking to intervene and attack a chattel mortgage. A demurrer to the complaint was sustained and judgment of dismissal entered. Plaintiff appealed from the judgment and judgment was affirmed. Thus the only question involved was the sufficiency of the complaint. The court said in its opinion:

“The complaint is totally defective and wholly insufficient to state a cause of action against the sheriff in this case. The plaintiff makes no attempt to show that Lang and Wunderlich had no other property out of which to pay their indebtedness.” (This is totally different from the facts alleged by appellees. Record p. 109.) “It contains no allegation of insolvency nor does it allege any facts from which insolvency can be reasonably inferred.” (This is totally different from the facts in our case. Insolvency is alleged in the case at bar. Record 107). “It does not state that the plaintiff has ever made any demand on Lang and Wunderlich for the payment of the debt due, nor does it show any steps taken for the collection of the same.” (The facts are exactly opposite in the case at bar. Re-

cord 108, 109). "They are not made parties defendant in the action against the sheriff nor has plaintiff reduced his claim to a judgment." (Our claim has been adjudicated and allowed. Record 108). "He has commenced no action against Lang and Wunderlich, has never attached this or any other property and in no way connects his right, interest or claim with the property that he seeks to restrain the sheriff from selling and no assurance is given when he will prosecute his action or that he will ever obtain a judgment against them." (Record 108, 109, shows that appellees have prosecuted actions against the debtor company as far as they were permitted to go.) "It can make no difference to the plaintiff whether the sheriff sells this property or not if Lang and Wunderlich pay the plaintiff. If they should have the means to pay their indebtedness to the plaintiff or if they have other property, either merchandise or cash, then there can be no reasonable objection to their paying their other debtor, the Exchange National Bank." (The facts are wholly different in the case at bar. The debtor is insolvent, and has no other property except this property covered by this deed of trust. Record 107-110).

Thus in the case at bar, we alleged every fact the absence of which rendered the complaint totally defective in the foregoing case. Continuing in its decision in the Neustadter case, *supra*, the Supreme Court of Idaho reviewed the decisions which used various expressions to the effect that those creditors entitled to attack a chattel mortgage must be those either holding "liens upon" or "claims to" or showing an "interest in the subject matter" and then laid down the Idaho rule to be as follows: "It would seem from the foregoing authorities that even if the plain-

tiff had otherwise pleaded a good cause of action he would still not be within the perview of the statute in that he in no way connects himself with an **interest in or claim upon** the property about to be sold. When he prosecutes his action and seeks to enjoin the sheriff from the discharge of his official duty, the plaintiff should be required to state a good cause of action and connect himself with such an **interest** as would entitle him to relief before being allowed to proceed further. Such has not been done in this case and the demurrer was properly sustained."

The Idaho Supreme Court pointed out the distinction in *Neustadter Bros. vs. Doust and Union Saving etc. Bank vs. Idaho Smelting and Refining Co.* that it was not necessary for a creditor to hold a lien before attacking a mortgage invalid as to creditors but that it was sufficient if the creditor could show a proper **interest** in the subject matter of the suit. And we have shown exactly the kind of an **interest** described in the case of *Union Trust etc. Bank vs. Idaho Smelting and Refining Co. supra*.

*Ryan vs Rogers*, 14 Idaho 309, 94 Pac. 427, as cited by appellant, p. 18 of its brief, simply holds that taking possession of the mortgaged property by the mortgagee cures defects in the mortgage.

*Martin vs. Halloway*, 16 Idaho 513, cited by appellant p. 18 of its brief, holds to the same effect.

The syllabus in the case of *Neustadter vs. Doust, supra*, was written by the court and it provides that if a general creditor has a **judgment**, he has such an **interest** in the mortgaged property, under certain



circumstances, as to entitle him to intervene and resist the foreclosure of a chattel mortgage; that a judgment creditor without a lien may be an interested party within the meaning of the statute. A judgment is not a lien on personal property in Idaho and if a creditor holding a judgment, may be an interested party and intervene, then a creditor holding the equivalent of a judgment may intervene. There can be no real doubt in any fair mind but that a creditor who has had his claim allowed and approved in receivership or insolvency proceedings has the equivalent of a judgment.

Ruggles vs. Cannedy 127 Cal. 290, says:

“In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged insolvent. After that judgment by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when these claims were allowed and approved the questions involved in them became **res adjudicata**. The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (Roan vs. Winn, 93 Mo. 503).”

Counsel for appellant is in error when he says on page 67 of his brief that the reasoning and the quota-

tion which the trial court adopted from *Ruggles vs. Cannedy*, supra, was based upon the local insolvency statute of California. The California court was careful to point out in its opinion that under the broad and general principles of law creditors holding the equivalents of judgments could attack a chattel mortgage covering the property of an insolvent debtor. And then, the California court went further and pointed out that since the assignee in insolvency by virtue of their local statute represented creditors whose claims had been proved and allowed, the assignee should also be allowed to attack the mortgage.

As to point number 4 on p. 18 of appellants' brief the appellees say:

That section 4111, Idaho Revised Codes, must be taken into consideration in determining whether or not appellees had a right to intervene in a mortgage foreclosure suit. This is the section that relates particularly to intervention and that portion of the section with which we are here concerned reads as follows: "Section 4111. Any person may, **before the trial**, intervene in an action or proceeding, who has an **interest** in the matter in litigation, in the success of either of the parties or an interest against both." This section controls in Idaho where a creditor seeks to intervene in a chattel mortgage foreclosure suit as well as in any other kind of suit. Our State Supreme Court recognized this fact and gave it full force and effect in the case of *Union Trust etc. Bank vs. Idaho Smelting and Refining Co.*, supra. The language used in this last named case is direct in

point as it was a case where this identical point was being discussed. It was a case where a creditor without a lien or attachment was seeking to intervene in a chattel mortgage foreclosure case and contest the validity of the mortgage. It is significant that this case was not even cited in all the numerous cases set out by appellant in its brief. Appellees brought themselves entirely within the rule laid down by the Supreme Court of Idaho in that case, as to the **interest** which creditors should have in the subject matter of the suit.

Thus we see that the case of *Horn vs. Volcano Water Company* 13 Cal. 62, cited and relied upon by appellant on pp. 18, 60, 63 and 66 of its brief is destructive of the position it takes.

*Horn vs. Volcano Water Co.*, *supra*, holds directly that:

“The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment.” Justice Field then points out that the California statute was copied from the Statute of Louisiana declaring that “in order to be entitled to intervene, it is enough to have an interest in the success of either of the parties to the suit.” Justice Field then quotes with approval from a decision of the Supreme Court of Louisiana in which that court says: “This we suppose must be a direct interest by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties.”

Therefore, the test to be applied in the case at bar is; would appellees have obtained "immediate gain or suffered loss" by the judgment to be rendered in the foreclosure suit? This question can be answered only in the affirmative. The mortgage purported to cover all of the property of the common debtor. The debtor was insolvent and had no other property. The decree prayed for requested that all the property be sold to satisfy the lien of the mortgage. The laws of Idaho provide that the mortgage was void as against creditors, but as pointed out by appellant itself, if possession under the mortgage were acquired by a purchaser at the foreclosure sale, no creditor could thereafter take advantage of the defects in the mortgage and appellees' claims would thus become wholly lost and valueless. Is this not "loss" by reason of the judgment to be rendered between the original parties?

The receiver had not answered, setting up the rights of the creditors, though he had had several months in which to do so. The case was set for trial, and the trial date was only a few days off. The rights of the creditors were being neglected. Unless the creditors intervened, the only property from which they might expect the payment of their claims would have been foreclosed upon by the lien of the mortgage and such foreclosure would have bound the receiver and all creditors in the receivership suit. So, it was the duty of the creditors, having knowledge of the default and neglect of the receiver to act for



them, to act for themselves and intervene in the foreclosure suit and protect their rights.

See also *People vs. Green*, 1 Iaho 235, at p. 239 and p. 240.

As to point No. 5 set forth by appellant on p. 19 of its brief these appellees say:

First: That this point was not raised by the appellant in the trial court. This appellant argued in the trial court that neither the creditors nor the receiver could attack the deed of trust and set forth in his argument as the reason why the receiver could not attack the chattel mortgage or deed of trust, that the receiver stood in the shoes of the mortgagor; that the mortgage was valid as between the mortgagor and the trustee or bondholders and therefore the receiver could not attack the mortgage or deed of trust.

Second: That the appellant should not be permitted to raise this point for the first time on appeal, especially when appellant urged an exactly opposite position in the trial court.

Third: The receiver, if any one, should raise this point and the receiver is not appealing.

Fourth: This appellant cannot complain that certain assets were not turned over to the receiver for pro rata distribution because this appellant has no deficiency judgment. This appellant has not filed a claim with the receiver for a deficiency judgment. The decree did not provide for a deficiency judgment. The proof was not sufficient to entitle the appellant to a deficiency judgment. The appellant has

waived its assignment of error concerning a deficiency judgment. If this complainant has no claim for a deficiency judgment filed with the receiver, it has no basis upon which it is to receive anything out of the distribution in the receivership suit. It cannot show any ruling on this matter to its injury. This attempt is made to cry deficiency judgment, and pro rata distribution, so that it can have an excuse to set forth an argument for its friend and ally the American Water Works and Electric Company.

Fifth: The receiver and all parties claiming through or under him are bound by the decree.

Atlantic Trust Co. vs. Dana, 62 C. C. A. 657,  
128 Fed. 209.

and the receiver is not appealing from the decree. "If the creditors, mindful of their interests are dissatisfied with the manner in which he (the receiver) represents them in suits that are pending, they may, under proper circumstances, intervene and ask to be made parties, so as to speak for themselves."

Atlantic Trust Co. vs. Dana, 62 C. C. A. 657,  
128 Fed. 209 at p. 224.

Sixth: Why did it not raise this point in the trial court? It was present and it could have asked the receiver to represent it in this connection, if it had had a deficiency judgment. The receiver was very eager to do all he could for appellant and was its principal witness and very willing. (Tr. 151 to 158 inclusive).

As to point No. 6 set forth by appellant in its brief on page 20, these appellees say:

First: If appellant had brought the foreclosure suit prior to the appointment of the receiver and appellees had made the showing set out in their petition to intervene in this cause, there is no doubt but what appellees would have been entitled to intervene in such foreclosure suit and contest the validity of the mortgage. This is undeniably true, under the decision of the *Union Trust etc. Bank vs. Idaho Smelting and Refining Co.*, *supra*. Our position is that our right to defeat the lien of this mortgage, which right we had prior to the appointment of the receiver, should not be defeated or cut off by the appointment of the receiver, and was not cut off by the appointment of the receiver.

By the appointment of the receiver, the receiver may have obtained the right to attack the mortgage for and on behalf of all the creditors. But this did not take away from the creditors their separate rights, which they had prior to appointment of the receiver, and which was not altered by the appointment of the receiver, to attack the chattel mortgage upon their own behalf. At least this is true when the receiver fails, refuses or neglects to act.

*Atlantic Trust Co. vs. Dana*, 128 Fed. 209,  
62 C. C. A. 657.

Second: What right has this appellant to complain? It has no deficiency judgment and has lost nothing by reason of the fact that these four creditors instead of the receiver made the attack upon the mortgage.

Third: This point could only be raised by the receiver. The receiver is not appealing. The receiver is bound by the decree.

As to point No. 7 set forth by appellant on page 21 of its brief these appellees say:

That this point is immaterial for the reason that the receiver chose not to attack the mortgage.

It is immaterial to appellees that the receiver did not have the right to attack the mortgage.

The only party injured by this argument of appellant is the friend and ally of appellant to wit; the American Water Works and Electric Company, who is bound by the decree. This is the view adopted by the trial court. (Record 308, 309).

As to point No. 8, raised by appellant on page 21 of its brief:

This point is an admission on the part of appellant that if the creditors had a right to attack the chattel mortgage before the appointment of the receiver, that the appointment of the receiver did not take away the right of creditors to attack the chattel mortgage after the appointment of the receiver, and so far as this point is material in this discussion, it is in favor of the proposition, that since the creditors had the right to attack the chattel mortgage before the appointment of the receiver, they had the same right after the appointment of the receiver.

As to point No. 9 raised by appellant on p. 22 of its brief these appellees say:



First: That this appellant cannot raise this point for the first time on appeal.

Second: That it made no assignment of error on this point.

Third: That it never made such a contention in the trial court.

Fourth: That it has no deficiency judgment. That under the proof introduced by it on the trial of the case, it was not entitled to a deficiency judgment and that it admitted to the court that it was not entitled to a deficiency judgment and that it stated to the court that it would be satisfied with a decree of foreclosure, and accepting appellants statement as his position in the matter, the court decreed the foreclosure but did not provide for a deficiency judgment.. The appellant waived its assignment of error based upon the court's failure to give a deficiency judgment for the reason that unless the appellant had waived its assignment of error, the court would have included in the record of the case on appeal the admission of appellant that it would be satisfied with a decree of foreclosure without a deficiency judgment under the proof as presented.

As to point No. 10 on page 22 of appellant's brief these appellees say:

First: This appellant did not raise this point in the trial court.

Second: This appellant should not be allowed to raise this point for the first time on appeal.

Third: This appellant has no deficiency judgment

therefore it has no claim upon which it could expect to pro rate in the receivership suit. Therefore it is attempting to complain of a ruling that can affect it in no way.

Fourth: The receiver would be the only party that could raise this point. The receiver is not appealing and is therefore bound by the decree.

### ARGUMENT.

The appellant the Equitable Trust Company of New York, in its brief on page 24 states that it has a double grievance: (1) That under the ruling of the trial court appellees became, through the appointment of the receiver, vested with the right, which they did not have when the receiver was appointed to attack this mortgage and (2) that the trial court held the assets so removed from the lien of the mortgage by the appellees should be distributed to such creditors instead of being turned over to the receiver for administration in the receivership suit for the benefit of all creditors.

As to its first grievance, we would answer that the trial court simply held that the appointment of the receiver did not deprive appellees of any rights or any defenses to appellants mortgage, which appellees might have set up before the appointment of a receiver.

As to its second grievance, we would answer that this appellant cannot complain that the \$45,000.00 obtained by these four claimants in the foreclosure suit, will not go into the funds in the receivership

suit, for the reasons that this appellant did not raise this point in the trial court; it should not be allowed to raise this point for the first time on appeal; it took a position in the trial court that the receiver should not be allowed to attack the mortgage because he stood in the shoes of the debtor; it has no deficiency judgment; it is not entitled to one; it could not pro rate in the receivership if the \$45,000 were placed in the receivership funds; it has waived its assignment of error on this point; it is only attempting to make this point to strengthen the demand of its ally, the other appellant, the American Water Works and Electric Company.

These two creditors—the Equitable Trust Company of New York and the American Water Works and Electric Company—have some sort of a collusive interest by which both will be satisfied if either of them can prevent any of the assets of the Great Shoshone and Twin Falls Water Power Company from paying any other creditors' claims.

Paragraph XVIII of the proffered amended complaint in intervention of the American Water Works and Electric Company reads as follows:

“That heretofore and early in the year, 1915, this intervener and National Securities Corporation entered into negotiations with respect to certain property of this intervener including its said claim against the said Great Shoshone and Twin Falls Water Power Company; that in the course thereof a proposition was made by said National Securities

Corporation to acquire all said property including said claim; that it was thereupon agreed between said parties that said National Securities Corporation should purchase the same but the purchase price was not agreed upon; that from time to time thereafter said parties endeavored without effect to agree upon such purchase price until some time in January, 1916.. That such purchase price has not been paid; that said claim is still the property of this intervener, and that title thereto has not passed and was not intended to pass to said National Securities Corporation or at all by virtue of said agreement or in any other manner.” (Record, p. 299).

The National Securities Corporation is the owner or holder of the bonds being foreclosed by this appellant. (Record p. 144).

Then the trustee proceeds on p. 24 of its brief to set forth its two contentions:

(1) “That the lien of its mortgage was superior to the claim of the appellees who were permitted to attack the same.

(2) That if it cannot hold the property under the lien of its mortgage, it should be administered in the receivership suit for the equal and pro rata benefit of all creditors.

As we have before pointed out, the first of these contentions is the only one which this appellant can make legitimately upon this appeal. However, we will direct our argument against both of these contentions.



## POINT ONE.

AS TO THE PLACE OF RECORDING CHATTEL MORTGAGES THE LAWS OF THE STATE WHEREIN THE PERSONAL PROPERTY MORGAGED IS SITUATED CONTROLS.

In re Nuckols, 201 Fed. 437:

“Where at the time of the execution of a chattel mortgage, the property was situated in a state other than that in which the mortgagor was domiciled and the mortgage executed, it is in bankruptcy proceedings, governed as to registration, and its validity and priority determined by the law of the state where the property was situated, rather than that of the state where the mortgage was executed, and in which the bankruptcy proceedings is being conducted.”

(See many cases cited in opinion.)

6 Cyc. 1060.

“It sometimes happens that the nature, validity, construction and effect of a mortgage has to be determined in a jurisdiction other than that where the contract was made. Where the place of contract and the locus of the property mortgaged coincide, the alws of that jurisdiction will govern the interpretation of the mortgage on the doctrine of comity. In cases where the property is situated in one jurisdiction and the mortgage is executed in another, the law of the place where the property is situated will usually govern.

See Jones Chattel Mtgs. Sec. 305.

Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258:

A mortgage of chattels is governed by the law of the place where the chattels are located at the time of the execution of the mortgage.

Pleasanton vs. Johnson, 47 Atl. 1025, 91 Md. 673:

A mortgage of personal property within the state, executed in another state according to the law there, but not conforming to Art. 21, Sec. 49, requiring an affidavit by the mortgagee that there is a bona fide consideration, is not, on the ground of comity, superior to an attachment of the property of the mortgagor.

## POINT TWO.

The deed of trust and supplemental mortgages sought to be foreclosed by appellant were void as to the species of personal property which did not form a constituent part of, and were not necessary for the maintenance, operation and repair of the public service corporation's plant.

Sec. 3408, I. R. C. Affidavit and Record of Mortgage:

"A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless:

First: It is accompanied by the affidavit of the mortgagor that it is made in good faith and without any design to hinder, delay or defraud creditors.

Second: It is acknowledged or proven, as grants of real estate, and the mortgage, or a true

copy thereof is filed for record with the county recorder of the county where such property is located and kept."

Bayne vs. Brewer Pottery Co., 90 Fed. (Ohio)  
754:

"RICKS, District Judge: On the 1st day of May, 1890, the Brewer Pottery Company duly executed to Samuel B. Smeath, trustee, a mortgage to secure 60 bonds, each for the sum of \$500, payable on the 1st day of May, 1895, with interest at the rate of 6 per cent. per annum, payable semi-annually on the first days of May and November of each year. By this mortgage the Brewer Pottery Company conveyed to Samuel B. Smeath, trustee, property described as follows:

Situated in the City of Tiffin, County of Seneca, and state of Ohio, and known as Blocks thirty-five and thirty-eight, in Second Highland Addition to the City of Tiffin, Seneca county, Ohio, containing eight acres of land: together with all and singular the brick pottery plant situated thereon, and including all its engines, machinery, tools, molds, and all other personal property belonging thereto, and used by said company in its business of manufacturing."

"This mortgage was, on the 7th day of May, 1890, duly recorded as a mortgage of real estate in the records of Mortgages, vol. 59, p. 165, of Seneca county, Ohio. The mortgage was never verified, as required by the statute of this state covering chattel mortgages, nor refiled at the expiration of any of the several years since its execution, as required by the Ohio statutes governing chattel mortgages. In April, 1897, upon appropriate bill of complaint filed by the complainants, who are creditors,

and bring the action in behalf of themselves and other creditors, Frederick A. Dugan was appointed an ancillary receiver of the Brewer Pottery Company, and thereupon he gave proper bond, and has ever since been discharging the duties of such receivership. Samuel B. Sneath filed his answer and cross bill in this action, setting up the mortgage above described, and upon appropriate proceedings the property was appraised and sold under the order of this court and the fund arising from such sale paid into court to await the further order of this court. Before the sale was made, however, a commissioner was appointed by this court, and directed to separately appraise the real property and the chattels of the Brewer Pottery Company, in order that the court might thereafter determine the proper mode of distribution of the proceeds of the sale. Such appraisement was reported in three schedules, etc. (See valuable discussion.)”

#### Conclusions of the court.

1. The mortgage in this case was a mortgage of real estate as to the property embraced in schedules 1 and 2, and a chattel mortgage as to the property embraced in schedule No. 3. As to the property in schedule No. 3, it came within the provisions of section 4150 of the revised statutes of Ohio, which are as follows: Sec. 4150 (Mortgage of Chattels void unless Filed.) Quotes section.

In *Bishop v. McKillican*, 57 Pac. 76, Cal. 1899, a corporation operating a street railway in Oakley, California, executed a mortgage to the California Title & Trust Co. The mortgage by its terms included all tracks, depot grounds, buildings, machinery, workshops, dummies, cars, rolling stock of all kinds, full equipment, tools, fixtures, and other property which is now, or may hereafter, in whole or in part be constructed, acquired, etc.



This mortgage was acknowledged and recorded as a real estate mortgage and contained no affidavit. This mortgage was not recorded as required by the Civil Code in reference to chattel mortgages. Afterwards, it is claimed by appellants, the railroad company acquired certain rolling stock, two bundles of wire cable, some old iron and some office furniture. A creditor attached the personal property just mentioned, and MacKillican, the sheriff, took possession of it. In an action brought by the California Title & Trust Co., the plaintiff herein was appointed receiver.

**Opinion:** "The property in question in this action is personal and not real estate. The mode and manner of mortgaging chattels or personal property is pointed out in Civ Code, Sections 2950 to 2972 \* \* \* As already stated the mortgage in question did not purport to be executed in pursuance to the requirements of the Code concerning chattel mortgages, but only as a mortgage of real property."

The court discusses the decisions of the federal court in *Southern California Motor-Road Co. v. Union Loan & Trust Co.*, 12 C. C. A. 215, 64 Fed. 450, and in *Illinois Trust & Savings Bk. v. Seattle Electric Railway & Power Co.*, 27 C. C. A. 272, 82 Fed. 941.

"Still it would hardly be claimed that an individual, owning a railroad and all the other property that ordinary railroad corporations own, could mortgage the whole property, real, personal, and franchises, in one instrument as a real estate mortgage. See also *Hoyle vs. Railroad Co.*, 54 N. Y. 314. The mode and manner of executing mortgage, both of real and personal property, will be found in altogether a different part of the code from that concerning corporations. It is declared in Section 2957 that a mortgage of personal property is void as against creditors of the mortgagor and subse-

quent purchasers and incumbrancers of the property in good faith and for value, unless executed and acknowledged and recorded as in the article prescribed. No exception is contained in favor of any person, whether a natural person or a corporation; and the language is too plain to be misunderstood, and requires no construction. It is intimated in the opinion of the circuit court of appeals referred to above, that if a state by statute has "settled the matter by direct legislation," the court will feel bound to follow it. We think that our state has settled the matter in the provisions of the Code referred to, and it is the duty of this court to follow the law as there laid down.

Manhattan Trust Co. of New York, v. Seattle Coal & Iron Company, (Wash.) 48 Pac. 333:

Bill by Manhattan Trust Co. against the Seattle Coal & Iron Co. for the appointment of a receiver for the defendant, a receiver was appointed and he took possession of the property. Murphey Grant & Co. and other creditors filed separate petitions asking that their several claims be declared prior to the lien of the trust deed of \$1,000,000, executed to plaintiff as trustee on defendant's property.

Opinion: "There is a large quantity of personal property taken possession of by the receiver, and it appears a considerable portion thereof realized upon, and the funds have been used by the receiver in his management and control of the properties. There was no affidavit of the mortgagor that any mortgage of personal property was made in good faith, and without any design to hinder, delay and defraud creditors, and it was not recorded as a chattel mortgage. Sec. 1648, 1 Hill's Code, is as follows: 'The mortgage of personal property is void against creditors of the mortgagor or subsequent pur-

chasers, and incumbrances of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property.' Section 1649 provides: 'A mortgage of personal property must be recorded in the office of the county recorder in which the mortgage property is situated, in a book kept exclusively for that purpose.' The plain literal meaning of these sections is against the contention of plaintiff that it has any lien whatever upon the personal property in the possession of the receiver, as against these petitioners."

In *American Loan & Trust Co. vs. Olympia Light & Power Co.*, 72 Fed. 620, Wash. 1896, chattel mortgage held void in this case, as to creditors, for failure to record as chattel mortgage, although it was recorded as a real estate mortgage, but where the mortgage supplied the defects by having the mortgage properly recorded as a chattel mortgage before the creditors had obtained a judgment, it was held that thus supplying the defects made the mortgage valid. The validity only dated from the date of properly recording and supplying the affidavit. This supplying of defects was done by the mortgagee before the foreclosure was started by the mortgagee.

*Blumauer et al. v. Clock et al.* (Wash.) 64 Pac. 844:

The mortgage was recorded in the auditor's office on the 18th of November, 1896, but the mortgage did not contain the affidavit of good

faith, and was recorded as a real estate mortgage.

Respondents Clock, et al., filed loggers' liens upon the mortgage property, but with knowledge of the mortgage. The mortgage was held to be ineffectual to create a lien as against creditors, as to the personal property.

Says Chancellor Kent (2 Kent's Commentaries, 523):

"The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale and still continue to be the visible owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession \* \* It necessarily creates a secret incumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind."

Ruggles v. Cannedy, 127 Cal. 290:

Head note: The record of a chattel mortgage upon personal property pursuant to section 2957 of the Civil Code is intended to take the place of the immediate delivery and continued change of possession of personal property required in other cases of transfer by Section 3440 of that code; and if the mortgage is not acknowledged or proved, certified and recorded, as required by Section 2957, it is void as to the creditors of the mortgagor.

Collerd vs. Tully, et al., 78 N. J. Eq. 557, 1911.

Opinion: "Section 4 of the chattel mortgage act (P. L. 1902, 487) makes the chattel mort-



gage absolutely void as against creditors unless the affidavit is annexed, and the statute makes it obligatory that it should set forth the consideration of the mortgage not partially but completely."

Head note: The affidavit required by statute to be annexed to a chattel mortgage must set forth the consideration completely, and if it fails so to do the chattel mortgage is absolutely void as against creditors."

In *people vs. Burns*, 161 Mich. 169, 125 N. W. 740: (See also valuable note attached to this case in 137 Am. St. Rep. p. 466) it was held that under the Michigan statute nothing short of a change of possession or a filing for record as prescribed by statute can save a chattel mortgage, as against creditors of the mortgagor. As to them his good faith, in the absence of compliance with the statutes, is immaterial.

Under a statute requiring that a chattel mortgage, in the absence of change of possession, must be filed, and that, before filing an affidavit must be annexed to it setting forth that the mortgage is not entitled to record, and if recorded is not notice, if the notary does not fill out or sign the blank jurat, although the mortgagor may have sworn to and signed the affidavit.

In *re Johnston, et al.*, 220 Fer. 218. Proceedings in Bankruptcy: Trustee seeks to set aside a mortgage.

,Head note: "Under Civ. Code, Cal. 2957, where chattel mortgagees neither signed an affidavit that the mortgage was not made to hinder and defraud creditors, nor were sworn to that effect,

it did not render the instrument valid that they went before a notary public for the purpose and with the intent of performing every act required by law to make the instruments a valid mortgage, especially in view of Code Civ. Pro. Cal. 2003, defining an affidavit as a written declaration under oath."

Hodgson vs. Butts, 3 Cranch, 140, 2 L. Ed. 391.

A chattel mortgage is void as to creditors and subsequent purchasers, unless it is acknowledged or proved by three witnesses and recorded as required by the Virginia statute regulating conveyances.

In Reynolds vs. Fitzpatrick, 57 Pac. 452 (Mont) 1899.

Head Note: A statement signed by all the parties to a chattel mortgage, but the jurat of which does not bear the signature or the seal of the officer before whom it was sworn to, is not a sufficient compliance with Civ. Code, Section 3861, providing that chattel mortgages shall be void unless accompanied by an affidavit of all the parties thereto, or their agents or attorneys in fact, stating that the mortgage was made in good faith and without any design to hinder, delay or defraud creditors.

Dunham vs. Cramer, 63 N. J. Eq. 151, holds: That the statutory requirements as to chattel mortgages extend not only to every instrument which is by its terms a mortgage, but also to every conveyance which is intended to operate as such.

In Hardin v. Bodge, 61 N. Y. S., 753, it is held: that though failure to file a mortgage covering both real and personal property may invalidate it as a chattel

mortgage, it does not affect its validity as a lien on the real estate.

First Natl. Bk. of Butte v. Beley, Sheriff, 80 Pac. 256, (Mont.):

A chattel mortgage of property left in the possession of the mortgagor is void as against attaching creditors where it is not accompanied by the affidavit of the mortgagee, required by Civ. Code Section 3861, that the same is made in good faith, without design to hinder, delay or defraud creditors.

Refiling of a mortgage originally void as to creditors does not validate it as it lacked the affidavit of good faith.

Opinion: "The statute is plain and needs no interpretation."

Machette vs. Wanless, 1 Colo. 225.

A chattel mortgage which is not acknowledged according to Rev. St. Ch. 14 Sec. 102 cannot be received in evidence.

Beeler v. C. C. Mercantile Co., 8 Idaho 644, at 650:

Sullivan J.: "Therefore a valid chattel mortgage cannot be given upon property other than that there prescribed; and there is good reason for this rule, as the registry law requires (Acts 1899, p. 121) chattel mortgages to be filed with the county recorder, and kept there, and certain facts contained in the mortgage must be entered in a record kept for that purpose; while a real estate mortgage must be filed by the recorder and recorded at length in different books, and a real estate mortgage registered as a chattel mortgage, vice versa, would not be a legal registry or recording. The provisions of said section are a prohibition against mortgaging real estate by a chattel mortgage.

After defining real estate and personal property, our statute prescribes the method and manner of incumbering and transferring each class, and it is not in the power of the parties to waive or alter, by their agreement, any of these regulations. In *Hoyle vs. R. R. Co.*, 54 N. Y. 315, the court in referring to rules established by statute for the transfer of property, said: "These regulations have been adopted with regard not only to the interests of the parties immediately concerned but also with regard to the interests of others in ascertaining the ownership of property."

Jones on Corporate bonds and mortgages, Sec. 138:

"Statutes in regard to acknowledging and recording chattel mortgages do not ordinarily embrace mortgages by railroads of personal property used and appropriated for railroad purposes, when such mortgages cover such personal property in connection with the corporate real estate and franchises." Cites:

*Hammock v. Loan & Trust Co.*, 105 U. S. 77;  
*Cooper v. Corbin*, 105 Ill. 224;  
*Peoria & Springfield R. Co. v. Thompson*,  
 103 Ill. 187;  
*Farmers', etc. Co. v. Detroit R. Co.*, 71 Fed.  
 29.

There is a special rule as to the legal nature of rolling stock.

Sec. 150 (Jones on Corporate Bonds and Mortgages):

In conclusion upon this part of the subject, it may be said that, while there are many and strong arguments for holding that rolling stock is part of the realty—and this view seems to have the support of the United States Courts—the weight of authority in the state courts seems to be against that position."



In *Hamilton v. David C. Beggs Co.*, 179 Fed. 949, it is said:

“In *Etheridge v. Sperry*, 139 U. S. 276, 277, 35 L. Ed. 171) Mr. Justice Brewer defined the attitude of Federal Courts as to chattel mortgage laws as follows:

“The matter is not one of general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself, under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property, are, primarily, at least, a matter of state regulation. We are aware that there is a great diversity of state regulation. We are aware that there in the rulings on this question by the courts in the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein.” *Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. Ed. 341.”

This mortgage was filed where only one of the two mortgagors resided.

*First National Bank of Egerton vs. Biederman*,  
Am. & Eng. Ann. Cases, 1913, C. 837, 134 N. W.  
1132, 149 Wis. 8:

Head Note under Statute, Wisconsin, 1888, Sec. 2313, which provides that a chattel mortgage shall be valid only against the parties unless possession be delivered and retained or the mortgage be duly filed (in this case there were two mortgages and mortgage was recorded only

where one resided instead of in both places as required by statute), a subsequent mortgagee with notice of a prior unrecorded mortgage takes free from the rights of the holder of such mortgage. \* \* \* Where words of a statute are definite and its meaning certain, there is no room for construction.

Opinion: "There is no room for interpretation or construction here. The words are definite and the meaning certain—'any other person than the parties', can mean but one thing and the court is not at liberty to construe it to mean anything else. \* \* \* The idea of the statute doubtless is that it is better to have the statute certain and effective than it is to leave the question in each case to depend on notice or good faith, and thus afford opportunity for conflicts in oral testimony and offer a reward to active and fertile memories."

### POINT THREE.

#### ACTUAL NOTICE OF UNRECORDED CHATTEL MORTGAGE DOES NOT BIND CREDITORS. BUT CREDITORS HAD NO ACTUAL NOTICE IN THE CASE AT BAR.

Gardenas v. Miller (California) 108 Cal. 250, 41 Pac. 472, 49 Am. St. Rep. 84:

A chattel mortgage is void against a creditor of the mortgagor, though he has notice thereof, under a statute declaring that a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, unless it is acknowledged, or proved, certified, and recorded in like manner as grants of real property. The words "in good faith and

foor value" refer to purchasers and encumbrancers, and not to creditors.

Section 318, Jones on Chattel Mortgages.  
 New York: Farmers' Loan & Trust Co. v. Hendrickson, 25 Barb. 484; Stevens v. Buffalo & N. Y. Ry. 21 Barb. 590.  
 Ohio: Houk v. Condon, 40 Ohio St. 569.  
 Texas: Brothers v. Mondell, 60 Tex. 240.  
 Nebraska: Spaulding v. Johnson, 67 N. W. 874.  
 Farmers & Merchants Bk. v. Anthony, 57 N. W. 1029.  
 Nevada: Simpson v. Harris, 31 Pac. 1009.  
 Michigan: Sachs v. Norn, 102 N. W. 357, Vining v. Millar, 74 N. W. 459.

In American Loan & Trust Company v. Olympia Light & Power Company, 72 Fed. 620, it was held: That under the statute of Washington relating to the lien of chattel mortgages, such a mortgage unless accompanied by the affidavit required by statute, and properly recorded, is void as to creditors, though they have actual notice of its existence.

In People v. Burns, 161 Mich. 169, 125 N. W. 740, 137 Am. St. Rep. 466, (with note attached) it was held: That an instrument which conforms to the recording laws is, when recorded, notice to every one, but an instrument which does not comply with the statutes on which it is based is notice to no one, even if recorded.

Ryan Drug Store Company v. Hvambzahl (1894) 61 N. W. 299:

Where revised Statutes 2313, declaring that no mortgage of personal property shall be valid,

as against third persons, unless the property be delivered to and retained by the mortgagee, or unless the mortgage, or a copy thereof be filed, is not complied with, the law conclusively presumes the mortgage to be fraudulent as to creditors, and no evidence of good faith, however clear, will render it valid.

The ground of an attachment being that defendant had a chattel mortgage on his store, which had not been filed, it is not material whether plaintiff knew before the debt was contracted of the existence of the mortgage.

Smith vs. Allen, 138 Pac. 683, Wash. 1914:

Rem. & Bal. Code Sec. 3660 providing that an unacknowledged chattel mortgage is void as against bona fide creditors, renders such void as to creditors, whether they become such before or after the recording of such mortgage and whether or not they have notice thereof.

In Hinchman bs. Point Defiance Ry. Co., 44 Pac. (Wash.) 867, the court construes the section requiring the recording of chattel mortgages and holds it immaterial whether the creditors had notice of an unrecorded chattel mortgage or not. The mortgage was recorded as a real estate but not as a chattel mortgage. In construing the mortgage as not effectual without being recorded as a chattel mortgage to create a lien on personal property as to creditors, the court said that such interpretation of the statute was in accord with the construction placed upon a similar statute by the courts of New York, Michigan, Ohio, New Jersey, Nebraska, Minnesota, Kansas and the Dakotas.

Alferitz v. Scott, 62 Pac. 735, (Cal.) 1900:



Where a chattel mortgage was recorded without the affidavit required by section 2957 from the mortgages, the omission was not remedied by a subsequent affidavit without again recording the instrument, and the mortgagors creditors could proceed by attachment against the property in the hands of the mortgagor.

First National Bank of Rock Springs vs. Ludvigsen, 56 Pac. 994, (Wyo.) 1899, Laws 1890-91 Ch. 7, Sec. 5 provide that every mortgage of personal property not accompanied with change of possession, etc., "shall be absolutely void as against creditors of the mortgagor, and as against subsequent mortgagees or purchasers in good faith," unless filed as therein required. Also provided "that chattel mortgages shall cease to be valid as against the creditors of the person making the same and as against subsequent purchasers or mortgagees in good faith" 60 days after its expiration, unless before such time an affidavit of the mortgagee of the amount still unpaid be made and filed, etc."

Opinion: "We are of the opinion that a chattel mortgage not renewed as required by law ceases to be valid as against creditors of the mortgagor who became such before as well as after the default in renewal."

In Pierson vs. Hickey, Sheriff, 91 N. W. (S. D.) 339:

"By the use of the word "subsequent" it is clear that the legislature intended to qualify only the words "purchasers and incumbrancers" and as no restriction is placed upon the word "creditors," all persons of that class are in-

cluded, whether antecedent or subsequent to the execution of the mortgage.”

(MANY CASES CITED).

“The injury that an unfiled chattel mortgage may occasion an antecedent creditor is likely to arise from the apparent unincumbered ownership of the property in the possession of his debtor, justifying the inference of perfect security, and inducing delay in the enforcement of his claim.”

#### POINT FOUR.

#### ONUS OF SEEING THAT CHATTEL MORTGAGE IS PROPERTY RECORDED IS UPON THE MORTGAGEE.

In *People vs. Burns*, 161 Mich. 169, 125 N. W. 740, (also see valuable note 137 Am. St. Rep. p. 493) the court said:

“One who seeks to benefit from the recording laws must incur all of the risks of the failure to put his papers duly upon record, whether the fault shall be his own or that of an officer; *Barnard vs. Cappau*, 29 Mich. 162; *Grand Rapids Nat. Bank v. Ford*, 143 Mich. 402, 114 Am. St. Rep. 668, 107 N. W. 76, 8 Ann. Cas. 102.”

#### POINT FIVE.

#### CONTEST OF FORECLOSURE.

A CREDITOR SHOWING A LIQUIDATED OR PROVEN CLAIM AND THAT AN EXECUTION HAS BEEN ISSUED AND RETURNED NULLA BONA OR THAT IT WAS IMPOSSIBLE TO HAVE AN EXECUTION ISSUED AND RETURNED NULLA BONA, BUT THAT IF

ONE HAD BEEN ISSUED, IT WOULD HAVE BEEN RETURNED NULLA BONA FOR THE REASON THAT THE DEBTOR WAS INSOLVENT AND HAD NO OTHER PROPERTY THAN THAT CONSTITUTING THE SUBJECT MATTER OF THE FORECLOSURE SUIT, MAY CONTEST SUCH FORECLOSURE BECAUSE SUCH CREDITOR IS FOR SUCH PURPOSE IN THE SAME POSITION AS A LIEN CREDITOR.

Idaho Revised Codes, Section 3418, "The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which purpose an injunction may issue if necessary."

Rule 37. Rules of practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States, Nov. 4, 1912.

#### "PARTIES GENERALLY--INTERVENTION.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determina-

tion of the cause. Persons having a united interest must be joined on the same side as plaintiff or defendants, but when any one refuses to join, he may for such reason be made a defendant.

Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the property of the main proceeding."

Section 4111. Idaho Revised Codes, 1907.

"Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both."

## IS A GENERAL CREDITOR A PROPER PARTY DEFENDANT?

A general creditor under ordinary circumstances, may not be, but the creditors intervening and answering in the case at bar are not general creditors. They are the equivalent of judgment creditors. Their claims have been presented, allowed and approved as valid claims against the debtor and had it not been for the intervening receivership proceedings, the creditors would have been judgment creditors. Moreover, the circumstances of this case are extraordinary and very unusual.

By the intertention of the receivership proceedings the creditors have been prevented from attaching taking their judgments and attacking the chattel mortgage as they othervise would have done and would have had a right to do.



So where there are allowed claims, which by operation of law are all that the creditors could have under the circumstances, which are the equivalents of judgments, when the mortgagee pleads that the lien of his chattel mortgage is prior and superior to all other liens, and where the law requires the mortgagee to make all lien claimants of record parties defendant and where the creditors would have been lien claimants of record had it not been for the receivership, then these creditors with allowed claims are practically forced into this case as defendants.

It is important too to notice that the receiver had taken no steps to protect the creditors. When this court allowed the creditors to intervene as defendants, the receiver had not answered. The creditors had the right to assume that if they were to have any protection, that they must attend to the matter themselves.

In 34 Cpc. 340, it is stated that where a court of equity calls upon creditors to come in and prove their claims, it is a substitute for separate suits at law on each of the claims.

Ruggles v. Cannedy, 127 Cal. 290: Head Note: Where creditors of an insolvent mortgagor of personal property are prevented from suing by reason of the adjudication of his insolvency, and are limited to the proof of their claims against him, such proof is equivalent to a **judgment**, and shows a sufficient interest of the creditors in the mortgaged property to warrant the assailing of the chattel mortgage as a void act for want of a prompt record, and the assignee in insolvency represents the interests of the creditors, and

may recover the property for their benefit.

Opinion: "In this case, the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment by force of the insolvency act itself, they were prevented from resorting to any proceeding in law or equity, for such purpose. They were limited to the presentation of claims in the insolvency court. This they did, and when those claims were allowed and approved the questions involved in them became **res judicata**. The presentation, allowance and approval of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the equivalent of a judgment. (*Roan v. Winn* 93 Mo. 503).

Says Mr. Justice Cooley in *Putnam v. Reynolds*, 44 Mich. 144.

Even creditors, it is said, cannot attack the mortgage, except indirectly through a seizure of the property by attachment, or other suitable proceeds. This is doubtless true where the invalidity of the mortgage arises from the fraud of the mortgagor; but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee may well be questioned. It would be easy to consider weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage, and which it might be well thought should control.

In re *Standard Telephone & Electric Co.*, 157 Fed. 106:

While, under the law of Wisconsin, a general creditor cannot attack the validity of a chattel mortgage by an independent action in equity, but must first exhaust his legal remedies, yet under the decision of the Supreme Court of the State, where such creditors are prevented from prosecuting by a general assignment or bankruptcy proceedings, the assignee or trustee in bankruptcy may attack such mortgage in their behalf; and especially may this be done where the property has passed into the hands of the court and the mortgagee comes into such court for the purpose of enforcing his lien.

Section 2650, Thompson on Corporations:

“Judgment creditors may intervene and attack the validity of bonds.”

Cites *Continental Trust Co. v. Toledo, etc. R. Co.*, 86 Fed. 929.

“Judgment creditors have generally the right to attack the validity of the corporate bonds or mortgage, and to intervene and be permitted to defend.”

*Phoenix Natl. Bk. v. Cleveland Co.*, 58 Hun. (N. Y. 606, 11 N. Y. S. 873.)

In the case at bar the creditors are not mere contract creditors as they have been forced out of that position of advantage which they otherwise would have had except for the placing of the property in the hands of the court. They would have been attaching creditors but their remedy at law was taken away from them.

Note: From A. & E. Ann. Cas. 1912 B. Vol. 23 p. 1108:

“According to many decisions it is not necessary that the creditor shall have a specific lien

on the property before he may assail the validity of an unrecorded mortgage.”

“He must have some right to or interest in or lien on the property itself. Before he may contest its validity, his debt must be fastened on the debtor’s property covered by the mortgage by law, judicial process, or in some other way. \* \* The statute does not declare such a lien (attachment or execution) essential. A levy is sufficient merely because it creates such a right to the property as that the plaintiff may resort to the courts for its protection. The lien created by the levy of a writ of attachment or execution, as distinguished from some other right to or interest in the property mortgaged, has never been held by this court to be essential before assailing an instrument as invalid because unrecorded. A right to the property obtained in any other way is quite as effective.” *Blackman vs. Baxter*, 125 Ia. 118, 2 Ann. Cas. 707, 100 N. W. 75, 70 L. R. A. 250.

“A creditor whose debt was subsisting at the time of the giving of a chattel mortgage may by subsequently obtaining judgment and levying upon the property, place himself in a position to attack the chattel mortgage or to resist its enforcement. But this is not the only way in which the right of a creditor to attack the validity of the chattel mortgage or to resist its enforcement may be asserted.”

“*Brockhurst vs. Cox*, 71 N. J. Eq. 703, 64 Atl. 182. affirmed 72 N. J. Eq. 950, 73 Atl. 1117. It is sufficient if he has secured “a lien thereon by levy under a judgment and execution, or by some other method acquired a legal or equitable interest in the property.” *Sullivan v. Miller*, 106 N. Y. 635, 13 N. E. 772. “A creditor could not attack the fraudulent transfer until he had obtained some process which authorized the seizure of the debtor’s property. That is the true interpretation of the dicta relating to unfilled chattel mort-



gages. The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite of enforcing the rights of creditors." *Skilton v. Coddington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, "The recovery of a judgment is not necessary if the property has been in some form legally appropriated to the discharge of the mortgagor's debts." *Farmer's L. & T. Co. v. Baker*, 20 Misc. 387, 46 N. Y. S. 266. "It may be observed that in view of the fact that in certain contingencies, as for instance insolvency, the debtor's property is sequestered for the benefit of creditors as fully and effectually as it could be by attachment and levy, officers appointed by the court are generally held to be entitled to attack the validity of such a mortgage, even though there may be no lien creditors. Moreover on the same theory unrecorded mortgages have in some cases been allowed to be attacked by creditors whose claims were alloyed in insolvency proceedings. *Ruggles v. Cannedy*, 127 Cal. 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371; *Jewett v. Priest*, 34 Mo. App. 509; or by creditors of an insolvent estate, the statute providing that the assets of such an estate shall be distributed among the decedent's creditors, *Currie v. Knight*, 34 N. J. Eq. 48g, Furthermore, it seems that if the administrator of an insolvent estate should **refuse** to act (or neglect?) any creditor could institute proceedings to require the proceeds of the mortgaged property to be devoted to the administration of the estate. "*Rock Springs First National Bank v. Ludvigsen*, 8 Wyo. 230, 56 Pac. 994, 57 Pac. 934, 80 Am. St. Rep. 928.

Appellant persists in making the erroneous statement that the trial court gave the appellees a prefer-

ence over other creditors "by virtue of the appointment of the receiver." This erroneous statement is made by appellant on pages 18, 20, 21, 23, 24, 27, 33, 34, 37, 43, 45, 49, 59, 87, 97, 98, and 102 of its brief.

This is entirely misleading and erroneous. It should be remembered that the case at bar is a foreclosure suit. No receiver was appointed in the case at bar. The receiver was appointed in an altogether different suit, started six months prior to the commencement of the foreclosure suit brought by the Equitable Trust Company of New York. It seems that this appellant is bent upon creating an erroneous impression in the mind of this appellate court and is bent upon confusing the facts to such an extent that this court will get the impression that a receiver was appointed in the case at bar. The receivership suit was commenced six months before this case at bar, this foreclosure suit. Many creditors filed their claims in the receivership suit. The creditors merely allowed their claims to lie on file in the receivership suit. This condition existed for several months in the receivership suit. For several months the creditors in the receivership suit did not even take the trouble to prove their claims in the receivership suit, as they supposed that the lien of the deed of trust of the Equitable Trust Company would take all of the assets of the insolvent debtor, and it was supposed that the creditors in the receivership suit, except the secured creditor, the Equitable Trust Company of New York, would get only two or three per cent on their claims and pos-

sibly nothing whatever. Then, six months after the receivership suit had been commenced, and the receiver appointed therein, the Equitable Trust Company of New York brought this action to foreclose its deed of trust, and supplemental mortgages, purporting to be a first lien upon all the property of the insolvent debtor, real, personal and mixed, acquired and to be thereafter acquired.

At the time this foreclosure case was brought, and practically down to the date of this trial of this foreclosure case, it was supposed by all the creditors that the Equitable Trust Company of New York could take all of the property of the insolvent debtor to satisfy its deed of trust. So general was this supposition among the creditors in the receivership suit that the creditors in the receivership suit had not even taken the trouble to prove their claims in the receivership suit.

Then, just a few days before the trial in the foreclosure suit, L. M. Plumer and E. B. Scull as executors of the estate of L. L. McClelland, deceased, from an examination of the bill of complaint, discovered to their agreeable surprise, what no other creditor had found, that there was a defect in the deed of trust and one of the supplemental mortgages, then being foreclosed in this foreclosure suit, to wit, that the deed of trust and supplemental mortgage though covering personal property which was not a constituent part of a public service corporation's plant and not necessary for the maintenance, operation and repair of the said plant, had not been ex-

ecuted with the formalities required by the statutes of the State of Idaho, in which said personal property was situated, in that it did not have the affidavit at the end thereof to the effect that such deed of trust and supplemental mortgage had been given in good faith and without intent to hinder, delay and defraud creditors, and furthermore said instruments had not been filed for record as such instruments covering chattels in the State of Idaho are required by the statutes of Idaho to be filed.

Thereupon, this claimant immediately called this discovery to the attention of the other three claimants, the Towle claim, the Hahn claim, and the Shank claim, and upon examination of the pleadings in the foreclosure case found that the receiver had not set up such defenses on behalf of the creditors and found that the receiver was in default and had put in no answer whatever. Immediately the McClelland claim was proved in the receivership case, and the three other claimants proved their claims in the receivership case, having first notified the receiver. These claims were taken up in court, the receiver and his counsel being present, at the time and place pursuant to due and proper notice and three of the claims were duly allowed and approved by the court upon the showing then and there made, in the receivership case. Prior to the commencement of the receivership case, the Hahn claim had been reduced to judgment. Immediately after proving their claims, the McClelland claim and the Shank claim petitioned for leave to intervene in the foreclosure suit for the



purpose of assailing the lien of the deed of trust and supplemental mortgage, and set forth in their petition for leave to intervene that the claimant was the owner and holder of a claim against the insolvent debtor in the sum of \$15,625; that the insolvent debtor was insolvent, and that in a receivership suit started six months before that a receiver had been appointed for the insolvent debtor and its property; that the claimant had proved its claim in the receivership case and that the court had duly allowed the same; that said claim was due, owing and unpaid, that claimants had exhausted their legal remedies; **that ever since the appointment of the receiver, it had been impossible for petitioners to sue and attack, as the said property, and all thereof of the insolvent debtor,** the Great Shoshone and Twin Falls Water Power Company has been in the hands of said receiver, and all legal remedies, if any there be are fruitless and petitioners have been and are wholly unable to collect their said claim by pursuing their legal remedies; that the Equitable Trust Company had filed its foreclosure suit (the case at bar) seeking to foreclose its deed of trust against all of the property of the Great Shoshone and Twin Falls Water Power Company and seeking to have all of said property sold to pay a claim of \$2,230,000.00, which complainant claimed due it; that unless the claimants are allowed to intervene in this foreclosure suit (this case at bar) and set up their defenses to the Bill of Complaint that the claim of this claimant will be rendered valueless."

See petition for leave to intervene (Record pp. 107 to 110).

The court thereupon allowed the claimant to intervene in the foreclosure suit, (the case at bar). The procedure upon the Shank claim was practically the same. These interveners did not delay the trial but filed their answers immediately. As to the Hahn claim and the Towle claim, no petition for leave to intervene in the foreclosure suit was necessary because the Equitable Trust Company of New York had made them parties when it filed its bill in the foreclosure suit (the case at bar).

The parties immediately proceeded to trial in the foreclosure suit. The trial took place in the latter part of October. The court thereafter rendered its decision (Record, p. 177) in the foreclosure suit, giving to the four claimants a prior claim over and above the lien of the deed of trust upon the personal property above described, and ordered that it be sold separately. The attorneys for the respective parties, however, stipulated that the property be sold as an entirety (Record, p. 187). These four claimants were the only creditors that had been diligent enough to prove their claims in the receivership suit, were the only creditors that attempted to assert their rights in the foreclosure suit, and at this time the receivership suit had been started over a year, and the foreclosure suit had been started over six months, and although the claim of the American Water Works and Electric Company was for a sum of over a million (\$1,000,000.00), it did

not prove its claim in the receivership suit until February 14, 1916, over three months after the trial in the foreclosure suit, and although its president, H. Hobart Porter, was also president of the Great Shoshone and Twin Falls Water Power Company; was a member of the bondholders' protective committee that negotiated a transfer of the bonds of the Great Shoshone and Twin Falls Water Power Company to the National Securities Corporation, and gave notice to the Equitable Trust Company to commence foreclosure proceedings on the deed of trust in the foreclosure suit at bar, and although this same H. Hobart Porter, president of the American Water Works and Electric Company, sent a telegram in response to one from the attorney for the Equitable Trust Company of New York to his attorney in Boise, Idaho, in the midst of the trial of the case at bar, directing his attorney to aid the foreclosure proceedings by filing an answer for and on behalf of the Great Shoshone and Twin Falls Water Power Company, it gave as its principal reason, three months after the trial in the foreclosure suit, that the court ought to allow it to intervene, that it did not know that the foreclosure suit was going on.

So, then, it appears undeniably from the record in this foreclosure case that these four claimants did not gain a preference or seek to gain a preference "by virtue of the appointment of the receiver" in the receivership case, as the Equitable

Trust Company has set forth and reiterated on so many pages of its brief.

These four claimants simply proved their claims in the receivership suit. They sought no preference whatever in the receivership suit and the court gave them no preference whatever in the receivership suit.

Then, after proving their claims in the receivership suit, seeing that they could, by diligence, assail the lien of the mortgage in the foreclosure suit and take something away from the lien of the mortgage, while taking nothing from the creditors in the receivership suit, intervened in the foreclosure suit, not "by virtue of the "appointment of the receiver" in the receivership suit, as this appellant would have you believe, but because under the circumstances as set forth in the claimants' petition for leave to intervene, such as insolvency of the debtor; exhaustion of legal remedies, etc., these claimants were in such a position that a court of equity would say that they had such equities in their favor that they could intervene in the foreclosure suit as a matter of right.

If the right of these two claimants to **intervene** in the foreclosure suit is to be controlled by the laws of the State of Idaho, then the Idaho case of Union Trust etc. Bank vs. Idaho Smelting & Refining Co., *supra*, is decisive of this point in our favor. We satisfied every requirement declared to be necessary in that case.



If the right of these two claimants to **intervene** in this foreclosure suit and attack the mortgage in a Federal Court is to be governed, not by a State statute or decision, but by the rule of the Federal courts, then the case of *Hollins vs. Brierfield Coal & Iron Company*, 150 U. S. 371, 37 L. Ed. 1113, is equally decisive of this point in our favor.

In this latter case, certain mere contract creditors, whose claims had not been reduced to judgment, and who had no lien upon their debtor's property, sought to maintain a creditor's bill, in an independent action, to set aside as void a trust deed which was then being foreclosed in another suit in the same court. Justice Brewer remarked that they did not ask to **intervene** in the mortgage foreclosure suit. Justice Brewer in writing the opinion of the court held:

"That such creditors whose claims had not been reduced to judgment could not maintain an independent creditor's suit under such circumstances, but that their proper course was to intervene in the mortgage foreclosure suit and there set up their claims just as appellees did in the case at bar."

In the opinion Justice Brewer says:

"Doubtless in such foreclosure suits, the simple contract creditor **can intervene**, and if he has any equities in respect to the property, whether prior or subsequent to those of the plaintiff, can secure their determination and protection." \* \* \*

"Their rights, like those of the trustee and the bondholders were derived from the corpor-

ation defendant. Each claimed under it, and the validity and amount of such claims were matters properly and ordinarily considered and determined in a foreclosure suit. It is true the corporation might admit the validity of any or all of the claims, and then the validity could only be a subject of inquiry as between the claimants for the purpose of determining the matter of **priority**, but to that extent, at least, both validity and amount are always open to contest and determination."

Justice Brewer further remarked: "The line of demarcation between equitable and legal remedies in the Federal Courts cannot be obliterated by state legislation."

Equity Rule No. 37. Promulgated by the Supreme Court of the United States Nov. 4, 1912.

INTERVENTION—" \* \* \* Any person may at any time be made a party, if his presence is necessary or proper to a complete determination of the cause. \* \* \* Any one claiming an interest in the litigation, may at any time be permitted to assert his right by intervention." \* \* \*

See also *In re Hickison*, 162 Fed. 345.

Appellant's second contention is that if it is not entitled to hold all of the property of the insolvent debtor under the lien of its mortgage, then the property not so held should be turned over to the receiver for distribution in the receivership suit.

This contention could properly be made only by the receiver or by a creditor entitled to share in the distribution of assets in the receivership suit.

The appellant does not belong to this class of creditor and the receiver is not appealing.

And it should be remembered that in this foreclosure suit at bar no creditor asked the trial court to turn over any assets, taken away from the lien of the mortgage, to the receiver.

In his belated answer in the foreclosure suit setting up no issues, the Receiver did not ask the trial court to turn over to him such assets as might be taken from the lien of appellant's mortgage.

No one made such a request of the trial court and no one has ever made such a request until the appellant set such point forth in its brief, and furthermore no pleading filed by any one in the trial court in the foreclosure suit ever made any such request.

Could it be expected of the trial court, to take it upon itself to make a decree, without request from any one that certain assets obtained by four creditors in a foreclosure suit, were to be turned over to other creditors in an entirely different, distinct and separate receivership suit, which had never been consolidated with the foreclosure suit, and that the trial court of its own motion and not having been requested by any creditor would take what four creditors had earned in one foreclosure suit and remove the same to another receivership suit and divide such assets up generally with creditors who had never made a request for such generosity on their own behalf or by their representative?

Moreover, if this appellant had raised this point in the trial court, which it did not do, it could only raise it on the basis that it was entitled to a deficiency judgment, and, therefore, entitled to pro rate its deficiency judgment with the other claims in the receivership suit. If this point had been raised in the trial court in the foreclosure case, we would have been ready to show and would have shown that it has already been over paid on its claim. Rather than risk the opinion of this appellate court on that point, appellant chose to abandon its fifteenth and last assignment of error (Record pp. 176 and 254.)

This assignment of error would have brought up for determination in this court the amount of the money judgment this appellant was entitled to, if any. In view of the record that would have been a proper part of the transcript if this assignment had been insisted upon the appellant preferred to leave this out. We would refrain from mentioning this matter if this appellant had not insinuated so many times that it had a deficiency judgment, when as a matter of fact, it has no deficiency judgment, and was not entitled to one.

This accounts for the paragraph in the Record at page 176, reading as follows:—

“Before settling the statement, counsel for appellant expressly waived its last assignment of error, (No 15), and therefore the statement is not made complete relative to the point therein involved.”

(Signed)

DIETRICH, Judge.



The assignment "expressly waived" by the appellant is as follows:—

"15. Because the Court erred in not entering judgment in favor of complainant for the full amount of the bonds issued and outstanding, to-wit, \$2,230,000.00, with interest thereon from the 1st day of May, 1914, at the rate of five per cent per annum."

## REPLY TO THE BRIEF OF THE APPELLANT, AMERICAN WATER WORKS & ELECTRIC COMPANY.

The appellant, the American Water Works & Electric Company, makes three specifications of error.

First: That the Court erred in denying the first petition of this appellant to intervene and requiring it to make a further showing by amended petition.

Second: That the Court erred in denying its amended petition to intervene.

Third: That the Court erred in ordering the four creditors, who had resisted the foreclosure of the mortgage, to be paid out of the fund which by the decree of foreclosure was set aside for that specific purpose.

(See brief of Appellant, A. W. W. & E. Co.,  
pp. 12 and 13.)

As to the first specification of error, appellees think that appellant will concede that the same was waived when it accepted the Court's ruling, took further time, as given by the Court, and attempted to comply with the Court's ruling.

In support of its position, appellants set forth two points:—

First: That after a receiver is appointed in a receivership suit, no creditor can by any subsequent proceedings acquire a preference in the trust funds so sequestered; and

Second: Where one claims an interest in a fund in the hands of the Court which can be protected only by intervention, that then he has an absolute right to intervene and to review by appeal an order refusing such right.

The first point as stated by appellant is misleading and confusing because it would lead this appellate court to believe that by some proceeding in the receivership suit, these appellees had obtained a preference in the receivership suit in the receivership funds.

This is absolutely erroneous. These appellees did nothing in the receivership suit except file their claims and prove them.

Then when the Equitable Trust Company commenced to foreclose a mortgage in an entirely different suit some six months later (the case at bar), these appellees intervened in that foreclosure suit (this case at bar), and assailed the mortgage void as to such attacking creditors.

We have not obtained a preference over any other creditor in the receivership suit and have not injured this appellant in the least and have not deprived it of any right and have not taken from it one cent

which it otherwise would have had in the receivership suit. The mortgage which we attacked was valid as between the mortgagor and the mortgagee and had the interveners not attacked the mortgage in the foreclosure suit the mortgage would have taken all of the property and none of the \$45,000 which the interveners, appellees, saved for themselves in the foreclosure suit, would have reached the receivership suit to be distributed by the receiver.

The receiver would have been the only party that could complain on this point in the foreclosure suit, if the receiver had made such a point in the foreclosure suit, as the receiver was a party and could have raised the point, but this appellant is simply a would-be intervener, it has never been a party to the foreclosure suit. It cannot raise a point based upon a ruling against the receiver in the foreclosure suit until it has been permitted to intervene in the foreclosure suit.

This appellant, like the Equitable Trust Company of New York, is also attempting to convey to this appellate court the impression that these four claimants have attempted by subsequent proceedings in the receivership suit, to obtain a preference in the trust funds in the hands of the receiver in the receivership suit.

This is far from the facts in these cases.

The appellees intervened in the foreclosure case on their own behalf, assailed the mortgage and were rewarded for their diligence in asserting their equitable rights in this foreclosure case by the de-

cree of the Court to the effect that from the proceeds of certain personal property which would otherwise have gone to satisfy the lien of the mortgage, these four creditors were first to be paid.

(See Decree in this foreclosure case, Rec., pp. 191, 192, 205 and 206.)

It will be noted by this court that this appellant is continually going outside the record in this case and stating in its brief, its interpretation of what the "trial court said from the bench," and "what all the attorneys in this case knew" and matters of this sort. We deny this appellant's interpretation of such things said and known, which are not set forth in the record and we intend to bring with us pleadings which were presented in the trial court by this would-be intervenor, which were prepared by the Equitable Trust Company of New York, and if any reference is made to such matters outside the records on the argument of these appeals, we will ask leave of this court to show this court these pleadings to prove the true relationship between these two appellants, and if this court thinks it necessary we may answer in reply to this appellant's question as to why we did not ask the receiver to set up our defense for us in the foreclosure case; and if we answer this question we will state the fact to be that the receiver was not only receiving his salary as receiver but was working and receiving his pay as well from the allied interests, the bond holders and this appellant and had stated to us that he did not want to see us get a <sup>cut</sup> ~~cut~~ and refused to give



us any information concerning the affairs or property of the debtor company and we had to obtain an order from the court before we could see papers giving us this information.

This appellant says on p. 27 of its brief:

“It is impossible to read the opinion of the District Court without seeing that his decision was largely influenced by the thought that if he knew all the facts there would appear somewhere among them sufficient reason for denying the application on the grounds of laches.”

In other words, this appellant is charging the judge who tried this cause with being suspicious of this appellant. It is a peculiar charge, indeed, to say that a court, presumably a fair arbiter, having absolutely no interest in the matter except to deal out even handed justice between man and man, should grow suspicious of this appellant without any cause whatever.

On p. 18 of its brief this appellant says:—

“The receiver by his answer in the foreclosure suit alleged that the lien of the trustee’s mortgage did not cover certain personalty, pointing out quite specifically the property not so covered, and as to it he sought to have the decree so limited that this property should not be sold under foreclosure but should remain in his possession for administration in the general creditors’ suit. Such, at least, was the necessary effect and his contention was sustained.”

This is contrary to the fact. Here is what Judge Dietrich said. ( Memo Decision, p 309, Record).

“How could the receiver have shown such interest in a lien upon the property in behalf of the petitioner? However that may be, upon an examination of the receiver’s answer and of the proofs, it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor of the petitioner or any other creditors. Proofs of the existence and status of claims were offered only by interveners and only touching their claims. The Court had no basis upon which to declare a lien in favor of petitioner.”

That appellant’s first point might have been well taken, were it not for the fact, which was conceded by counsel for appellant in the trial court in the foreclosure case, that its position is precisely the same and the share it will receive out of the funds in the hands of the receiver in the receivership suit is precisely the same that it would have been, had the appellees never intervened in this foreclosure suit and wrested \$45,000 from the mortgagee.

Appellant made this admission in the trial court. (Records, 306.)

On page 22 of its brief this appellant states:—

“The facts in regard to this entire matter appears in appellant’s complaint in intervention. It was under oath and no denial was made of any of its statements and they must therefore be deemed admitted.”

It is a peculiarly significant fact that the name of its president, H. Hobart Porter, though appearing so many times in the record in this foreclosure case, is not mentioned by this appellant in its brief. Espe-

cially is this so when this appellant now claims that the trial judge had to believe its petition for leave to intervene when it professed ignorance of this foreclosure case in its petition for intervention, and where it showed in the record that this appellant was one that ordered the commencement of the foreclosure suit, and especially is this significant where the record shows that its president sent a telegram in the midst of the trial of the foreclosure suit to aid its ally, the Equitable Trust Company of New York.

Is the trial court bound to believe any allegation this appellant may present, when the trial court knows from facts appearing in the record that such allegations are false?

It may be that in certain cases intervention is a matter of **right** and not a matter of **discretion**.

But where a petitioner to intervene is shown by the record in the case in which he is attempting to intervene, to be guilty of collusion, and laches; to be bound by the decree which bound the receiver; and to be estopped by its own actions; then surely, the Court would not be compelled to do a vain and useless thing, merely allow the intervention with the intention of immediately denying the intervener any rights in the case.

Furthermore, we thing it a very perilous position for appellant to take, that it has an absolute right to appeal after a decree has been entered.

Especially is this true where the effect of the intervention would be to set aside the decree of foreclosure.

On page 23 of its brief this appellant states:—

“So Towle and the interveners did not urge any defense that would not have otherwise have been presented, nor did they take any independent action upon the trial.”

This statement is diametrically apposed to the truth and the record in this case.

(Transcript, p. 309, last paragraph of Judge Dietrich's Decision.)

### INTERVENTION.

#### THE AMERICAN WATER WORKS & ELECTRIC COMPANY SHOULD NOT BE ALLOWED TO INTERVENE.

1. Because of collusion with the bondholders and the trustee complainant in the foreclosure action.

2. Because it is guilty of laches.

3. Because it was bound by the pleadings of the receiver in the foreclosure suit.

4. Because it is estopped by the action of its president, H. Hobart Porter, as the record shows that the president of the American Water Works & Electric Company tried to prevent the four prior lien claimants from obtaining liens prior to the lien of the mortgage.

#### THE AMERICAN WATER WORKS & ELECTRIC COMPANY SHOULD NOT BE ALLOWED TO INTERVENE

Because, if allowed to intervene and become a



party, it would not be entitled to any equitable relief under its complaint in intervention as amended and submitted.

First: Because said amended complaint, and the record in this case shows that there was collusion between the American Water Works & Electric Company and the bondholders, by which they attempted to prevent the four prior lien claimants from obtaining prior liens over and above the mortgage lien.

Second: Because said amended complaint in intervention does not give valid excuse for the laches of the American Water Works & Electric Company and on the contrary shows, when read with the rest of the record in this case, that such delay in attempting to present its claim was deliberate and calculated and still a part of its program to aid the bondholders in preventing any of the creditors of the debtor corporation besides itself and the bondholders from obtaining anything free and above the lien of the mortgage.

Third: Because said complaint in intervention does not show why the American Water Works & Electric Company was not bound by the decree in the foreclosure action in which the receiver was a party defendant and filed an answer presumably in its capacity as receiver for all general creditors who had filed their claims but who had not proved them in the receivership suit.

Fourth: Because while said petition for leave to intervene and the second amended complaint as pre-

sented, while it attempts to profess utter ignorance of the foreclosure suit and the proceedings therein, refers to the record in the receivership suit and the foreclosure suit, in which records are contained proof so contradictory to this professed ignorance and so convincing that such allegations of ignorance and innocence are not considered credible.

Fifth: Because said complaint in intervention shows that there was collusion in this: That instead of asking to be allowed to intervene, in the same manner that the four claimants had attacked it, it simply asked to intervene for the purpose of pro rating in what little the four claimants had wrested from the bondholders and the National Securities Corporation, which corporation was undoubtedly going to take care of the claim of the American Water Works & Electric Company in the reorganization plans.

Sixth: This collusion and deliberate laches is further shown by the fact that when the appellees attempted to intervene, in the foreclosure suit, the complainant and filed motions and objections to the interventions and moved to strike them out, on the grounds that it would prolong the litigation and that parties were coming in not of its own choosing, but when the American Water Works & Electric Company attempted to intervene, the complainant did not object to this party prolonging the litigation and did not say that this was an intruder not of its own choosing?

Seventh: Because said petition for leave to inter-

vene does not show any lack of equity on the part of the four special claimants. It does not show that the four claimants are depriving other general creditors of anything which they otherwise would have had.

Eighth: Because the petition for leave to intervene does not show that the lien of the mortgage was not good as between the mortgagor and the mortgagee, and as against the receiver, and as against all creditors until attacked by appropriate court proceedings; nor that the lien is not still good because the receiver has not seen fit to attack the mortgage.

Ninth: Intervention is too late.

Tenth: Because these four claimants have been injured by the delay of the American Water Works & Electric Company in attempting to intervene, as these four claimants have stipulated that the property upon which the four claimants have a prior lien is of just sufficient value to pay their own claims with interest and had they known that this American Water Works & Electric Company was intending to make a belated attempt to pro rate in that sum, these creditors might have fixed a value very much higher on the property on which the court held that these four claimants had a prior lien.

Eleventh: This delinquent attempt to intervene has injured us by its laches, and has by its laches allowed us to put ourselves in a position which is inferior to a position we could have taken had we known that it would intervene.

Twelfth: This delinquent applicant to intervene sat by and did not aid us in our attack on the mortgage, and the president of the American Water Works & Electric Company, now asserting this claim to intervene for the purpose only of pro rating, not of obtaining anything further from the mortgage on its own behalf, aided the mortgagee and consented to the proceedings to foreclose the mortgage, having prior to that time sold out its bonds to the mortgagee.

Thirteenth: Because the petition for leave to intervene shows that this applicant to intervene has sold this claim to the mortgagee and undoubtedly expects to get paid for it by the mortgagee, and that it now asserts the claim merely as a cat's paw to aid the mortgagee in an attempt to wipe out all creditors except the mortgagee and this large claimant.

Fourteenth: We have not injured other creditors or misled them.

Fifteenth: There must be an end to litigation.

Sixteenth: Because the amended petition of the American Water Works & Electric Company shows that it can be paid in full for its claim by the National Securities Corporation or that it has an action for breach of contract against a presumably solvent corporation.

Seventeenth: Because we have established prior claims of the date of December 6, 1915, and have been placed in positions by equity, that at law would have amounted to prior executions of date Decem-



ber 6, 1915, upon \$45,000.00 worth of personal property of the judgment debtor. So, if an intervenor were allowed to come in and establish a lien, such a lien of date three months later than ours, would only attach upon such surplus remaining after our prior liens had been fully satisfied and discharged.

THE RECEIVER WAS AN ORIGINAL PARTY TO THE FORECLOSURE SUIT AND IS BOUND BY THE DECREE, LIKEWISE THOSE WHOM THE RECEIVER REPRESENTD IN THE FORECLOSURE SUIT, ARE BOUND BY THE DECREE.

The receiver is bound by the decree, and at the time the receiver was bound by the decree, he was representing the American Water Works & Electric Company, and the other general creditors in the receivership suit who were not appearing for themselves in this foreclosure suit.

The receiver was right there in court at the time of the trial of this foreclosure action and could have made any defense he saw fit to make against the mortgage.

At the time when the decree was entered, on Dec. 6, 1915, and at all times prior thereto, and at all times subsequent thereto up until the 28th day of February, 1916, the American Water Works & Electric Company had simply filed its claim in the receivership suit. It had not proved its claim in the receivership suit. If the American Water Works & Electric Company was represented by the receiver

in the foreclosure suit, then the American Water Works & Electric Company was bound by the decree.

“Where the receiver of a corporation required by the order appointing him to defend any suit seeking to establish a lien against the corporation’s property, intervened in a foreclosure suit against the corporation brought in the same court, and litigated the claim of the complainant therein under his mortgage to a fund due the corporation, a decree awarding the fund to the mortgagee is binding not only on the receiver, but also on all parties to the suit in which he was appointed, including interveners therein, such parties being represented by him, and neither necessary nor proper parties to the foreclosure suit.”

Atlantic Trust Co., v. Dana, 62 C. C. A.,  
657, 128 Fed. 209.

Why does not the claimant, the American Water Works & Electric Company, ask the receiver to sue or intervene as it claims we should have done? It does not show that it asked the receiver to sue. It claims to have brought the application to intervene on behalf of itself and others similarly situated and it claims in its petition and complaint for leave to intervene that there are creditors to the extent of \$4,000,000. It is quite noticeable, however, that this claimant, the American Water Works & Electric Company, stands alone in its attack upon the four creditors who have succeeded in taking \$45,000.00 away in spite of the lien of the mortgage. No other creditor has availed itself of the opportunity to be-

come associated with this large and powerful litigant.

Why did the Equitable Trust Company not make a motion to dismiss the petition of the American Water Works & Electric Company to intervene? It objected to the intervention of the four creditors on the grounds that it would prolong the litigation.

**“AN INTERVENTION THAT SAVORS OF LACHES AND IS OF DOUBTFUL EQUITY WILL NOT BE PERMITTED.”**

Central R. R. Co. v. Farmers L. Co. 112 Fed 81.

Section 1372 Streets Fed. Eq. Practice.

U. S. v. Northern Securities Co., 128 Fed. 808.

“The right of intervention should be asserted within a reasonable time, and under Code Civ. Pro. Dakota, Sec. 90, providing that a complaint in intervention must be filed by leave of court, it is not error to refuse to allow such a complaint to be filed on the eve of trial, after the action has been pending two years, and in behalf of one who has slept upon his rights.”

Smith v. Gale, 144 U. S. 509, 36 L. Ed. 521.

“But where it appears that the applicant has been guilty of laches, permission to intervene may be denied or granted upon terms.”

“It is a general rule that an intervention will not be allowed when \* \* \* it will change the position of the original parties.”

“It is usually provided by statutes authorizing intervention that the intervention must be made before trial. Under such a statute a motion comes too late after the cause has been submitted to the court, or after default has been entered, under other statutes an intervention

may be filed at any stage of the case, whether before or after issue joined, provided the intervention does not retard the principal suit. In any event, the action must be still pending and an intervention cannot be allowed after a cause has been settled by the parties, or after judgment."

31 Cyc. 519 et seq.

Under Code Civ. Pro. 1887, Sec. 24, providing that any person may intervene **before the trial** of an action, a party cannot intervene after a default for want of an answer has been entered and not set aside.

Safely v. Caldwell, 42 Pac. 766. (Cal.)

Code Civ. Pro. 387, provides that any person may intervene in an action **before the trial**. After a judgment for foreclosure by default had been entered against an administratrix, an heir at law obtained leave ex parte to intervene in the action. Plaintiff moved to dismiss the complaint in intervention, and the motion was sustained. Held: That the intervention was made **too late**, and as leave to file same was given ex parte, the action of the court dismissing intervenor's' complaint was proper.

Hibernia Sav. & Loan Soc. v. Churchill, 61 Pac. (Cal.) 278.

Under Ballinger's Annotated Codes & St. 4846, providing that any person may, **before trial**, intervene, etc., a complaint in intervention must be filed before trial.

Seattle & N. Ry. Co., vs. Bowman, 102 Pac. (Wash.) 27.



The statute relating to intervention applies where one at some stage of the proceeding before trial is shown to have an interest which would make him a proper party.

Houston R. E. Inv. Co. v. Hechler, 138 Pac. (Ut.) 1159.

In *Seligman v. City of Santa Rosa*, 81 Fed (Circuit Court N. D. California, April 10, 1897) Head Note: Equity Procedure—Intervention. Under Section 387, Code Civ. Pro. Cal., providing that any person interested may intervene in an action or proceeding '**before the trial**,' an application to intervene comes too late which is made at the time of the submission of the case on bill and answer."

"The motion afterwards made to have the judgment set aside, and for leave to intervene, was an application to the **sound discretion** of the court. To the action of the court on such a motion, no appeal lies, nor is the subject of a bill of exceptions or writ of error."

*Conner v. VanNess*, 18 How. 394, 15 L. Ed. 432.

"Where an order granting conditional leave to intervene is set aside before the condition is complied with, the case stands the same as though the application had been denied in the first instance; and where the showing made by the petition is such that the granting or refusing leave to intervene was **discretionary**, the petitioner not being entitled to such leave as a matter of right, the order refusing such leave is not appealable."

Appeal from Circuit Court of Western Dist. of Mo. On motion to dismiss appeal.

Mass. Loan & Trust Co. v. Kansas City, 110 Fed. 28.

“No appeal lies from an order of the circuit court refusing petitioners leave to intervene and become parties to the suit. Only parties can appeal.”

Re Cutting, 94 U. S. 14, 24 L. Ed. 49.

“The **discretion** of the chancellor in refusing to allow intervention in a suit which has been long pending will not be reviewed by the appellate court.”

Gunderson v. Ill. Trust Co. 100 Ill. Ap. 461, 199 Ill. 420.

Whitehouse Equity Prac. Vol. 1, p. 389n.

“Applications for leave to intervene in a case after entry of a final decree **are very unusual**. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise.”

United States v. Northern Securities Co., 128 Fed. 808 at 810.

In Credits Commutation Co. vs. United States, 91 Fed. 573, 34 C. C. A. 12, Affd. 177 U. S. 311, 44 L. Ed. 782, it is held that an appeal does not lie from an order of the court below denying a motion in a pending suit to permit a person to intervene and become a party thereto and cites to the same effect:

Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49,  
Guion v. Liverpool etc. Co., 109 U. S. 173,  
27 L. Ed. 895.

THE AMERICAN WATER WORKS AND ELECTRIC COMPANY SHOULD NOT BE ALLOWED TO INTERVENE, BECAUSE, IF ALLOWED TO INTERVENE AND BECOME A PARTY, IT WOULD NOT BE ENTITLED TO ANY EQUITABLE RELIEF UNDER ITS PETITION FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION AS SUBMITTED, FOR THE REASON, THAT THE FOUR LIEN CLAIMANTS HAVE ESTABLISHED PRIOR LIEN CLAIMS OF THE DATE OF PRIORITY OF DECEMBER 6, 1915, AND BY EQUITY HAVE BEEN PLACED IN POSITIONS WHICH, AT LAW, WOULD HAVE AMOUNTED TO PRIOR EXECUTIONS MADE ON DECEMBER 6, 1915, UPON \$45,000 WORTH OF PERSONAL PROPERTY OF THE JUDGMENT DEBTOR.

Our position is:

That the receiver takes possession of the assets of an insolvent debtor subject to existing liens.

Section 138 High on Receivers.

Black et al vs. Manhattan Trust Co. et al.,  
213 Fed. 692.

34 Cyc., 191, 193.

So that when the receiver of property of this insolvent corporation took possession, all of the property of the corporation was subject to the lien of the mortgage, as the mortgage covered all of the property of the corporation.

This mortgage was a valid lien upon all of the

property of the debtor corporation, and was a valid lien as between the mortgagor corporation and the mortgagee;

Marchand v. Ronaghan, 9 Idaho, 95;

and was a valid lien as to all of the property of the debtor corporation as to all of the world, until attacked by some proper, interested party, setting up prior claims to the lien of the mortgage.

On the 23d day of October, 1915, four creditors pleaded, in another suit, this foreclosure suit at bar, and proved on the hearing, facts which, but for the fact that the assets of the debtor corporation were in the hands of the receiver, entitled these four claimants to a judgment against the insolvent corporation, and this Court held in its decree dated the 6th day of December, 1915, that these four claimants were entitled to a prior lien over and above the lien of the mortgage, on certain personal property of the debtor corporation, not forming a constituent part of the said public service corporation's plant. These four claimants had appeared for themselves only and not on behalf of other creditors. These four claimants were not attempting to get a prior lien upon a trust fund which, but for their liens, would otherwise have been distributed to the general creditors. These four claimants were endeavoring to obtain a lien prior to the mortgage lien upon enough property to pay their own claims and were attempting to obtain prior liens upon property that otherwise would not have gone to pay



general creditor's claims, but would have gone to pay off the lien of the mortgage.

Had it not been for the fact that the assets of the debtor corporation were then in the hands of the receiver, subject, however, to the lien of these four claimants and also to the lien of the mortgage, these four claimants could have had execution issued on the 6th day of December, 1915, and could have sold personal property on which the Court held that the four claimants had a prior lien, without regard for any other claimants that might have sued out liens of later date.

The Court fixed the liens of these four claimants as prior liens on certain personal property, over and above, yet covered by, the lien of the mortgage, and fixed the date of these liens, tantamount to judgment liens, on December 6, 1915.

On what theory of law or equity does a judgment lien claimant of subsequent date claim the right to pro rate with prior judgment claimants?

Suppose that an intervenor were now allowed to come in, and the Court should now decide that such intervening creditor had a prior lien to certain personal property over and above the lien of the mortgage, would a lien which practically amounts to a judgment lien, of a subsequent date to the lien of the four claimants be allowed to pro rate with prior judgment liens?

But suppose that the intervenor should contend that under the doctrine of *Chemical National Bank*

vs. Armstrong, the adjudication of insolvency and the appointment of a receiver, worked an equitable levy upon the assets of the insolvent corporation.

Even then, it must be conceded that the equitable levy, thus effected, would be only a levy upon such assets as were subject to such a lien. The assets of this corporation being already subject to a lien, good as between the mortgagor and mortgagee, and as to all the other creditors until a paramount lien was asserted in a proper manner, there would be no assets covered by the mortgagee upon which the lien of the receiver could attach.

If the receiver, or the creditors for themselves, had taken the proper steps to assert a lien prior to the mortgage lien, and had established a prior lien of certain date, then that would be a different matter and such creditors would pro rate in the proceeds resulting from their common judgment. But where the receiver does not attack the lien of the mortgage by appropriate pleadings and does not ask in his answer for a lien, prior to the lien of the mortgage, and the court does not give him a lien in the decree, then whatever possession the receiver has is subject to the existing liens, and it would take appropriate action on his part or appropriate action by the creditors themselves on their own behalf to render the lien of the mortgage subsequent to the lien of the creditors. The receiver and other creditors had ample time and notice of the foreclosure proceedings to take action to render the lien of the mortgage subsequent to the liens which creditors might have

had on certain personal property subject to the lien of the mortgage. These four claimants took what this court regarded as proper action to establish their liens, and they took such actions in their own behalf and for themselves only and this court has recognized them in the decree and has fixed the date of priority of their liens as of December 6, 1915.

Now, under what theory does a subsequent lien claimant claim the right to pro rate with a prior lien claimant under the facts of this particular case?

Priorities in this equitable proceeding are governed by the rules of equity.

Our position is this, that when the court rendered its decree on December 6, 1915, and the same was docketed, these four claimants might have had execution issued and levied upon the identical personal property which was sold for \$45,000.00 under the decree. That being true, then our equitable lien actually attached to that identical personal property on that date.

Now, that being practically equal to an execution at law, our title then became practically the prior legal title. Then, admitting that there are equal equities, this, now practically legal title, which we have acquired, must prevail.

“The lien of the mortgage continues upon the **fund** as it subsisted upon the premises before they were sold.”

Oleutt v. Bynum, 17 Wall. 44, 21 L. Ed. 570.  
No. 488 Mtgs. U. S. Sup. Ct. Dig.

Liens upon mortgaged property attach to the **proceeds** of the sale in the same **order** and with the same effect as they bound the premises before the sale.

Markley v. Langley, 92 U. S. 142, 23 L. Ed. 701.

Mtgs No. 494 U. S. Sup. Ct. Dig.

Therefore the liens of the claimants have attached to the **proceeds** as of date Dec. 6, 1915, upon the \$45,000.00 of the purchase price.

Furthermore, these proceeds amount to \$2,000,000 in the foreclosure suit.

By the decree, the court had these proceeds placed in the hands of a special master. This special master holds as trustee under the decree \$2,000,000, under the decree for the mortgagee and these four claimants, and to be distributed according to the terms of the decree in the foreclosure suit.

“Money in **custodia legis**, in the hands of the clerk of the court in his official capacity, cannot be made the subject of a creditor’s bill.”

6 Pom. p. 1423.

Anheuser-Busch v. Hier, 52 Nebr., 424, 72 N. W. 588.

United States v. Eisenbois, 88 Fed. 4.

“WHERE THERE IS EQUAL EQUITY  
THE LAW MUST PREVAIL.”

Pomeroy Eq. Rem.

“Sec. 417.—The meaning of the maxim is, if two persons have equal equitable claims upo nor



interests in the same subject matter, or in other words if each is entitled to the protection and aid of a court of equity with respect to his equitable interest, and one of them, in addition to his equity, also claims the legal estate in the subject matter, then, he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of equity refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, where, of course, the legal estate alone would be recognized. One of the most frequent and important consequences and applications of this principle is the doctrine, that when a purchaser of property for a valuable consideration and without notice of a prior equitable right to or interest in the same subject matter, obtains the legal title in addition to his equitable claim, he becomes, in general, entitled to a priority both in equity and at law."

## CREDITOR SUING FOR HIMSELF OBTAINS PRIORITY.

Sec. 893, Pom. Eq. Rem.

"It is a general rule that in a judgment creditor's suit a single creditor may file a bill on his own behalf; that he is entitled to retain the priority thereby gained over other creditors, and cannot be forced to divide with them."

Sentor v. Williams, 61 Ark. 189, 54 Am. St. Rep. 200.

Elmore v. Spear, 27 Ga. 193, 73 Am. Dec 729.

Gordon v. Lowell, 21 Me. 253.

George v. Williamson, 26 Mo. 190, 72 Am. Dec. 203.

Pullis v. Robinson, 73 Mo. 201, 39 Am. Rep. 497.

McDermott v. Strong, 4 Johns Ch. 687.

Edmeston v. Lyde, 1 Paige Ch. 637, 19 Am. Dec. 454.

Corning v. White, 2 Paige 567, 22 Am. Dec. 659.

Hammond v. Hudson, 20 Barb. 378.

Clark v. Figgins, 31 W. Va., 157, 13 Am. St. Rep. 860, 5 S. E. 643.

In Edgell v. Haywood, 3 Atk. 357, it was said:

“The person who first sues has an advantage by his legal diligence in all cases. The complainant by his judgment and execution at law, and by his diligence in this court, has obtained a position which entitled him to a priority over the other creditors of the debtor.”

Sec. 893—Pomeroy’s Eq. Rem.

“Three methods of procedure are open to the creditor whose execution at law is returned unsatisfied, was the conclusion arrived at by Chancellor Walworth, in a leading case; that ‘he might file a bill to reach the equitable estate of the defendants, either in his own name or for his own benefit, or might join with others standing in the same situation in a joint suit for their joint benefit, in proportion to the amount due to each, \* \* \* or, that he might file a bill in the usual way, in behalf of himself and all others standing in the same situation, as judgment creditors whose executions had been returned unsatisfied, and who might choose to come in under the decree, and contribute to the expenses of the suit.’ I can see no reasonable objection to either mode of proceeding. The latter, at first blush, may appear the most equitable, but the first two are much more likely to insure a vigorous prosecution of the suit, and, on further examination, it may seem unjust that the creditor who has sustained all of the risk

and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit. Since priority among different creditors' bills is gained by the creditor who first files his bill and serves process, it is said to be immaterial in what order the judgments which are the foundations of the different suits recovered."

**EQUAL EQUITIES:** First in order of **time**.

Secs. 416, 591, 678, 682, 718.—Pomeroy.

"As between persons having only equitable interests, if their interests are **in all other respects equal**, priority in time gives the better equity."

"In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these; the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points, it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights."

"Sec. 415—Its Effect.—It follows from this explanation of the principle that when several successive and conflicting claims upon or interests in the same subject matter are wholly equitable, and neither is accompanied by the legal estate, which is held by some third person, and neither possesses any special feature or inci-

dent which would, according to the settled doctrines of equity, give it a precedence over the others wholly irrespective of the order of time, under these circumstances the principle applies, and priority of claim is determined by priority of time."

1 Pomeroy's Eq. Jurisprudence, 690, 691, 692, Pages.

"Sec. 718.—Priority of Time among equal equities.

"The general doctrine is well settled, as already stated, that among successive equitable estates, liens and interests which are equal—that is, where neither claimant holds the legal estate or has the best right to call for it, and neither is intrinsically superior to the others, nor is affected with any collateral incident, such as negligence or fraud—the order of time controls, even though a subsequent holder acquired his interest without any notice of the prior one. Under these circumstances the maxim **QUI Prior EST TEMPORE, POTIOR EST JURE**, applies. The doctrine has been fully recognized and constantly enforced by American courts wherever its operation has not been interfered with or modified by the recording acts."

2 Pomeroy p. 1260.

## EQUITY AIDS THE VIGILANT, NOT THOSE WHO SLUMBER ON THEIR RIGHTS.

"Section 418. Its Meaning. It is a rule controlling the Administration of Remedies. The principle embodied in the maxim, the original form of which is *Vigilantibus non dormientibus aequitas subvenit*, operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs, than as



being the source of any distinctive doctrines of the jurisprudence. Indeed, in some of its applications it may properly be regarded as a special form of the yet more general principle. He who seeks equity must do equity. The principle thus used as a practical rule controlling and restraining the award of reliefs is designed to promote diligence on the part of suitors, to discourage laches by making it a bar to relief, and to prevent the enforcement of stale demands of all kinds, wholly independent of any statutory periods of limitation. It is invoked for this purpose, and in all classes of cases, except perhaps those brought to enforce a trust against an express trustee.

Pomeroy's Equity Jurisprudence, 3rd Edition.

"Section 461, High on Receivers, 4th edition.

"As between different judgment creditors of the same debtor, one of whom by his superior diligence, obtains possession of or a charge upon the debtor's property, equity will not interfere in behalf of a more dilatory creditor to disturb such possession."

In conclusion we submit that the decree and orders of the trial court should be affirmed in all respects. The appellees who attacked the trust deed and mortgages were vitally interested parties; they would necessarily be affected by the direct legal operation of the decree to be rendered between the original parties, for the decree sought would have devoured the only property from which they could possibly expect their claims to be paid. State statutes declared the trust deed and mortgages void as to creditors, and these creditors by their petitions

to intervene showed that they had placed themselves in a position to challenge the validity of these instruments. The deed of trust and supplemental mortgages are only invalid to the extent necessary to pay the claims of the four attacking creditors. The claim, made by the appellant, the Equitable Trust Company of New York, that the proceeds of the personality upon which the claims of the attacking creditors had been declared superior to that of the Equitable Trust Company should be turned over to the receiver in order that the Equitable Trust Company might pro rate therein with a deficiency judgment is a sham. It is made only for the purpose of aiding its friend and ally, the American Water Works & Electric Company. The appellant, Equitable Trust Company of New York, never made such a request or contention in the trial court. It has no deficiency judgment and never will have one and has waived this point for the purpose of this appeal.

As to the appellant, the American Water Works & Electric Company, it fought shoulder to shoulder with the mortgagee and bondholders in the trial court and did everything within its power to prevent appellees from taking anything from its friend and ally, the Equitable Trust Company of New York. This it did under an agreement by which it was to receive its pay from the National Securities Corporation. It was perfectly willing then to make some secret arrangement with the mortgagee by which, perhaps, it was to receive pay for its claim

in full. Why did it not ask other creditors to come in and pro rate in its contemplated deal with the mortgagee? Why did it not explain fully to the trial court the reason for its president aiding the mortgagee in an effort to crush the attacking creditors? We have never injured the American Water Works & Electric Company, and have never sought to do so. Certainly many explanations were due from this appellant to the trial court before it could demand as a matter of right that it be allowed to change its colors and intervene and come to our side and take away from us 96½ per cent of the fruits of a hard won victory.

The American Water Works & Electric Company has made its own bed and should be compelled to lie in it.

Respectfully submitted,

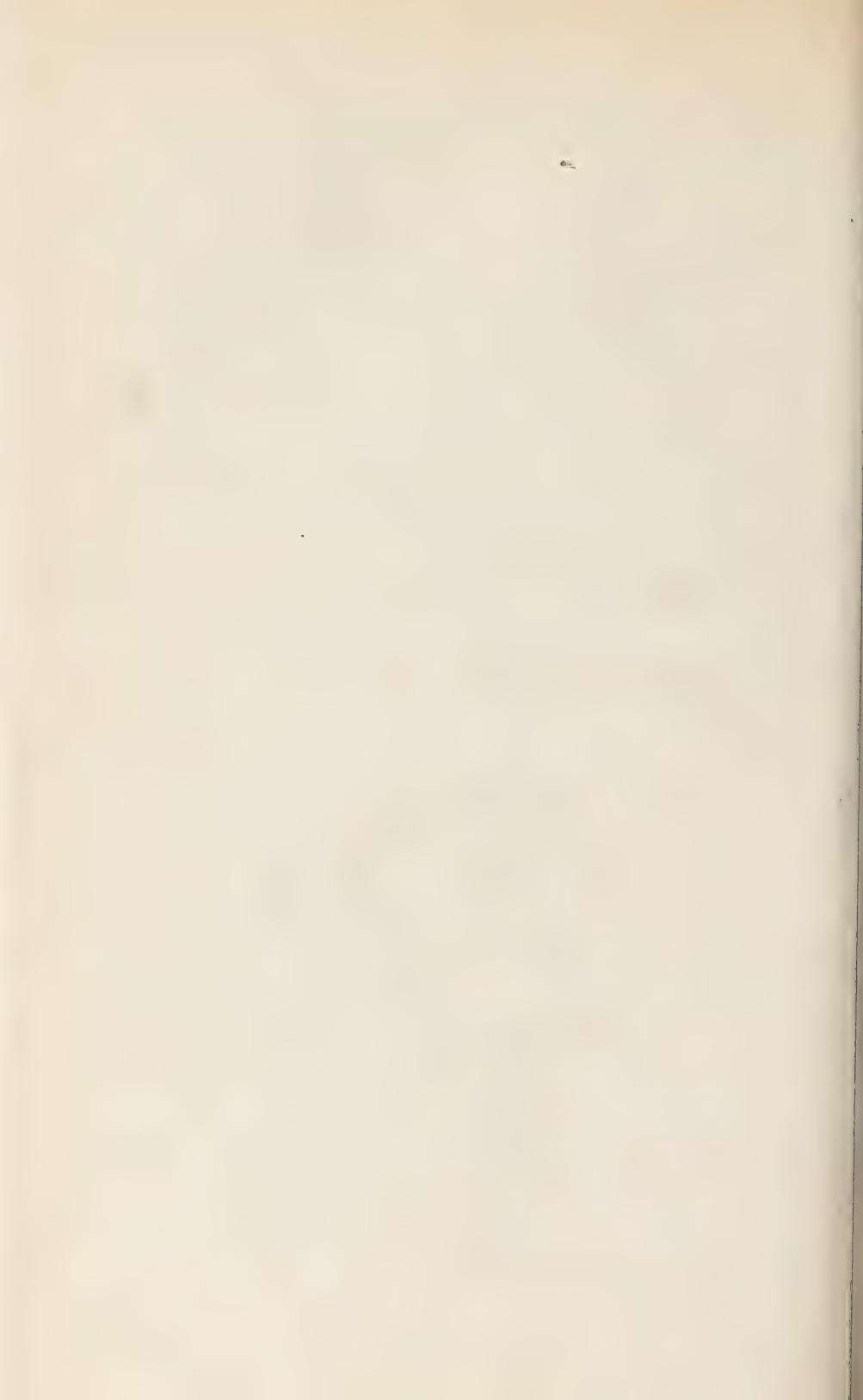
PARIS MARTIN,

WILLIAM E. CAMERON,

ALFRED A. FRASER,

Solicitors for Appellees.

Residence, Boise, Idaho.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners.  
Appellees.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellees.

**REPLY BRIEF OF APPELLEE**

CARL J. HAHN, ADMINISTRATOR OF HARRY M. KING  
TO BRIEF OF EQUITABLE TRUST CO., TRUSTEE, APPELLANT

Upon Appeal From the United States District Court for the District  
of Idaho, Southern District.

JAMES H. WISE  
Residence: Twin Falls, Idaho,  
Solicitor for Carl J. Hahn, Administrator of Harry M.  
King.



**United States**  
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Upon Appeal From the United States District Court for the District  
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terest on said mortgage and bond to the Equitable Trust Company of New York, but permitted said company to continue in operation and possession of the property by and through a receiver (95).

On April 14, 1915, the Equitable Trust Company of New York started a foreclosure proceedings on the bond issue heretofore mentioned and set out (7 and 78). This appellee was made one of the parties defendant in said cause of action, and filed his answer May 15, 1915 (88 to 101, inclusive).

Said cause of action was tried in the United States District Court of Idaho, and decree of foreclosure entered on the 6th day of December, 1915 (189-210). The property was sold January 8, 1916 (214-215). In the decree of foreclosure the claim of Carl J. Hahn, administrator of the estate of Harry M. King, deceased, appellee was allowed as a preference right for the sum of \$6,225.15 (192).

The court ordered the special master appointed in the foreclosure suit to pay the full claim of said Carl J. Hahn (224-227) for \$6,225.15 and interest (242).

## ARGUMENT

The judgment, dated September 23, 1914, of Hahn for \$5,590.00, and costs of \$174.35 (101), was a lien upon the real, personal and mixed properties of the Great Shoshone & Twin Falls Water Power Company, prior to the appointment of the receiver on November 2, 1914 (170).

Section 15, Article II, Constitution of Idaho.  
Section 4462 Revised Statutes of Idaho, 1908.



Seymour vs. Boise R. Co., 24 Idaho 7; 132 Pac. 427.

This appellee was prohibited from enforcing his lien and judgment dated September 23, 1914, by the appointment of a receiver on November 2, 1915. The appellee, however, is protected in his lien, constitutional right or constitutional inhibition by the constitution of the State of Idaho. Section 15, Article 11, constitution of the State of Idaho, Revised Statutes of Idaho, 1908, page 122, provides as follows:

“The legislature shall not pass any law, permitting the leasing or alienation of any franchise, so as to release or relieve the franchise, or property held thereunder, from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges.”

It might be well at this time to pay some attention to the meaning of the word “alienate.” “Alienate” means to convey or to transfer the title to property (Black’s Law Dictionary). This is a general ordinary accepted term of the word “alienate,” as provided in the foregoing provisions of the Idaho Constitution. It will be noticed that in these definitions the word “conveyance” is used, and the legislature of the State of Idaho has seen fit to define the word “conveyance” in so far as it applies to property in the State of Idaho.

Section 3161, Revised Statutes of Idaho, provides as follows:

“The term ‘conveyance’ as used in this Chapter

embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills."

It will be noted from the reading of this Section of the Idaho Statutes, that the words "alienate" and "conveyance" are synonymous terms.

The right in the statute that a corporation may use, rent, or sell the same, includes the power to mortgage it. A mortgage is in effect a sale with the power of defeasance, which may ultimately end in the absolute transfer of title.

Willamette Woolen Manufacturing Co. vs. Bank of British Columbia, 119 U. S., 198; 30 L. Ed. 387.

In a mortgage the legal ownership is vested in a creditor, but in equity the mortgagor remains the actual owner until he is barred by his own default or by judicial decree.

Cowles vs. Diketon, 140 Mass. 376.  
Anderson Law Dictionary, Page 688.

The word "alienate" extends not only to alienation of lands by deed, but also to alienations in law, and transfer of title by devise, descent, or levy would be as technically an alienation as a transfer by deed.

Lane vs. Mutual Fire Insurance Co., 12 Me., 44;  
28 Am. Dec. 150.

A voluntary petition in bankruptcy constitutes an alienation.

Cotgraves, 2 Chapter, England, 795.  
In re: Amherst, L. R., 13 Equity, England, 464.

A confession of judgment and sale, by the sheriff in pursuance of that judgment, is an alienation.

Stansbury vs. Patton Cloth Manufacturing Co.,  
5 N. J. Law, 505.

In this case, the court said:

“A confession of judgment, and the sale by the sheriff, in pursuance of that judgment, is in the strictest sense an alienation and is wholly immaterial whether one actually makes the conveyance himself, or constitutes an agent, or trustee to make it for him, or in order to render the transaction sale more solemn, go into a court of justice and by certain forms of procedure, procure it to be made by an officer of the law.”

Mt. Vernon Mfg. Co. vs. Summit County Mutual  
Fire Insurance Company, 10 Ohio St., 348.  
Eldridge vs. Okmulgee L. & T. Co., 90 Pac. 930.  
Sharp vs. Lancaster, 100 Pac. 179.

Mortgages of land are conveyances within the meaning of Sec. 3161 of the Revised Statutes of Idaho, and Section 1215, Vol. I of Kerr's Civil Code of the State of California.

Carl vs. Hastings, 3 Cal., 179.  
Tolman vs. Smith, 74 Cal., 345-349; 16 Pac. 189.  
In re: Estate McConnell, 74 Cal., 217-218; 15 Pac.  
746.  
Hassey vs. Wilke, 55 Cal., 525-528.  
Odd Fellows Savings Bank vs. Banton, 46 Cal.,  
603-607.

Sec. 3388 of the Revised Statutes of Idaho defines mortgages as follows:

“A mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.”

Brown vs. Bryan 6, Ida., 15.  
Hanna vs. Vensel, 19 Ida., 803.

So in the case at bar, the alienation became complete, upon the sale of the property on the 8th day of January, 1916 (214-215).

At this time we desire to call the court's attention to that part of this constitutional provision of Idaho, or the words: "Contracted or incurred in the operation, use or enjoyment of said franchise, or any of its privileges." The courts of Idaho have construed this part of the constitutional provision, and have said:

"A judgment obtained for personal injuries by a corporation in operating its street cars, is a liability contracted or incurred in the operation, use or enjoyment of the franchise of such corporation, within the meaning of Section 15, Article 11 of the State constitution, and becomes a claim against the franchise and property of such corporation in the hands of a purchaser or grantee of the franchise and property held thereunder."

It was the intention of the framers of the constitution to make these pre-existing liabilities preferred claims against the franchise and property transferred.

Seymour vs. Boise Railroad Company, 24 Ida., 7-16; 132 Pac. 427.  
Cooper vs. Utah Light & Power Company, 35 Utah, 570; 135 Am. St. 1075; 102 Pac. 202.  
Lee vs. Southern Pacific Railway Company, 116 Cal., 97; 58 Am. St. 140; 47 Pac., 932; 38 L. R. A. 71.  
City of South Pasadena vs. Pasadena Land & Water Co., 152 Cal., 579; 93 Pac., 490.  
Northern Pac. Railroad Co. vs. Boyd, 228 U. S. 482; 57 L. Ed. 931.  
Penn. S. Co. vs. N. Y. City R. Co., 208 Fed. 168.



This construction makes it plain that neither the franchise nor the corporeal property therewith can be so alienated as to relieve them from liabilities incurred in their operation, use and enjoyment.

In Penn. S. Co. vs. N. Y. City R. Co., 208 Fed. 168, and on page 184 in relation to tort claims, the court use the following language:

“The next claims are those for tort. That is, from damages resulting to individuals from the operation of the road before receivership. It is contended that because such damages are the usual and natural results of running a railroad they are considered as much an operating expense as are the various materials and supplies used in such operation. The question of priority in payment of tort claims of this sort has been frequently before the courts. The decisions clearly indicate that they rank with general unsecured claims. It may be that in some cases shocking injustice would result from those classifying them and a court of equity might be inclined to extend the rule as to the operating supply claims, so as to cover them.”

At this point, however, I wish to say, that all the decisions of the Supreme Court, holding that they rank with general unsecured claims, are under statutes which have no such provisions as the constitution of the State of Idaho, and therefore, such decisions are not applicable in the case at bar.

The mortgage given by the Great Shoshone & Twin Falls Water Power Company covers the income of such company. At the same time the privilege of using that income until possession was delivered to the mortgagee, and all the operating expenses were to be paid out of the net in-

come of the Great Shoshone & Twin Falls Water Power Company during its possession and control of the same (47-49).

In the case of *Fosdick vs. Schawl*, 99 U. S., 235, 25 L. Ed., 339, and at the foot of pages 342-343, the Court uses the following language:

“For even though the mortgage may in its terms give a lien upon the profits and income until possession of the mortgaged premises is actually taken, or something equivalently done, the whole of the earnings belong to the company and are subject to its control \* \* \*”

The mortgagee has his strict rights, which he may enforce in the ordinary way. If he asks no favors he need grant none, but if he calls upon a court of chancery to put forth its extraordinary powers and grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. Such an application always calls for the exercise of judicial discretion, and the chancellor should so mold his order that while favoring one, injustice is not done to another. If this cannot be accomplished the application should ordinarily be denied.

No fixed and flexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act.

The foregoing case seems never to have been questioned,

and seems to be the basis of equitable rule. That each case most largely depends upon its own equities. Practically all of the cases reached back to this case of *Fosdick vs. Schall* for the principle, but the tendency seems to be to extend this rule to meet the needs of the modern conditions in the wonderful exposition of industrial and transportation influences of human affairs. This more fully appears from the dissenting opinion of Judge Caldwell in *Illinois Trust & Savings Bank vs. Dowd*, 105 Fed., 123, and the language of Judge Caldwell is pertinent at this time, for the reason that he was speaking that the doctrine was not based upon written law. We quote:

“It is difficult to harmonize all the judicial utterances and conclusions in the different cases that have been considered by the courts, but this is not surprising when we reflect that the whole doctrine is of modern origin, and that it is not based on written law, but upon equitable considerations, the application of which in a large degree, upon the sound judicial discretion of the chancellor having due regard to the circumstances of the particular case.”

The case at bar is based upon constitutional provision and judicial decisions of Idaho as well as the equitable doctrine. Sec. 15, Article 11, Constitution of Idaho.

*Seymore vs. Boise Railroad Co.*, 24 Ida., 7; 132 Pac. 427.

*Lee vs. Southern Pacific Railroad Co.*, 47 Pac. 932.

*Cooper vs. Utah Light & Railway Co.*, 102 Pac., 202, 207.

It appears from the cases, that the court may include in its order, appointing a receiver, the right to pay these pref-

erential claims, but this does not seem to be necessary, as shown in *Farmers Loan & Trust Company vs. Kansas City*, 53 Federal, 189.

In *Galveston vs. Cowdry*, 78 U. S., 459; 20 L. Ed. 199, 207, the court holds: That no demand was made for possession other than bringing the bill of foreclosure, and that that was not a demand for possession, and the income need not be accounted for to the mortgagee.

*Gillman vs. Coicondall*, 95 U. S., 603; 23 L. Ed. 405-410.

*The American Bridge Co. vs. Cortright*, 94 U. S., 798; 24 Law Ed. 144.

In case of *Green vs. Coast Line Railroad Company*, 33 L. R. A., 806, is a case quite fully discussed in this question and we call the court's attention to the following quotation from the syllabus:

“By invoking equitable relief, such as the appointment of a receiver, and the administration of the mortgaged property, by equitable means, and agencies, mortgagees submit themselves to do equity relatively to any creditor of the mortgagor, who may rightly intervene in a foreclosure proceedings in which such relief is sought. Mortgages upon a railway, and the income from the same, the mortgagor being left in possession, or as to the income whether produced before or after the appointment of a receiver in foreclosure proceedings subject to be postponed in equity in favor of a claim for damages, resulting from a tort committed by the mortgagor while, and by reason of, operating the railway after the execution of the mortgage.



Hale vs. Frost, 99 U. S., 389; 25 L. Ed. 419.  
 Farmers Loan & Trust Company vs. Northern  
 Pac. Railway Company, 71 Fed., 245.

And on page 247, the Court states:

“There can be no reason or just ground for discriminating by allowing one class of current expenses, as for expenses, wages, or money due, to connecting line, for any change of traffic to be paid and refusing payment for any other expense, unavoidably incurred in the operation of the railroad, as for instance, a judgment for personal injury to a passenger or employee, or for damages to merchandise in transit.”

In the light of the foregoing rules, and in the light of the constitution and decisions of the State of Idaho, and in the light of the conditions of this case, and circumstances surrounding it, the equity should appeal strongly to this court.

A court will appoint a receiver to do what, if a receiver should not be appointed, the company itself ought to do. Every mortgagee in accepting his security impliedly agrees that the current debts and operating expenses made in the ordinary course of business shall be paid, from the current receipts before he has any claim upon the income. The whole earnings belong to the company and are subject to its control.

Fosdick vs. Schawl, 99 U. S., 235-252-253.  
 Lucy Green vs. Coast Line Railway Co., 33 L. R.  
 A. 806.  
 Southern Railway Company vs. Carnegie Steel  
 Co., 176 U. S., 257; 44 L. Ed., 458.

Operating expenses, no matter when accruing, may be allowed out of the earnings of the company during the

time of the receivership, and may be allowed out of the corpus of the company.

Southern Railway Company vs. Carnegie Steel Co., 176 U. S., 251; 44 L. Ed. 458.  
Finance Company vs. Charleston, 51 Fed., 369.

A claim for death or personal injury in Idaho is an operating expense.

Seymour vs. Boise Railway Co., 24 Idaho, 7.; 132 Pac., 427; 132 Pac. 427.

The State of Idaho having provided by constitutional provision and decisions of its courts, the operating expense of a corporation, the same becomes the law in federal courts, and when the United States courts find principles distinctly settled by constitution and statutes, and adjudications, they have no more right to question them, or deviate from them, than could be correctly exercised by their own tribunals.

Livingstone vs. Moore, 7 Pet., 469-451; 8 Law Ed., 751.  
Robertson vs. Campbell, 3 Wheat, 212-221; 4 Law Ed., 471.  
United States vs. Thompson, 98 U. S., 486; 490; 25 Law Ed., 194.  
Baltimore Railroad Company vs. Joy, 173 U. S., 226-230; 43 Law Ed., 677.  
Bucher vs. Cheshire Railroad Co., 125 U. S., 555-582; 31 Law Ed., 795.  
Balkan vs. Woodstock Iron Company, 154 U. S., 177-187; 30 Law Ed., 953.

As the law of the respective state courts, constitutions and statutes had been adopted in order to accomplish sub-

stantial justice, according to the peculiar and local circumstances of each state, and as the people were content under the operation under those municipal regulations, it was natural to presume that by the adoption, the same rule for federal courts, the same salutary effect would be produced.

Brown vs. Van Braam, 3 Dall., 344; 1st Law Ed. 629;

McNeil vs. Holbrook, 12 Pet., 84; 9 L. Ed., 1009.

Where a course of decisions, whether founded upon statute, or not, have become rules of property as laid down by the highest courts of the state, they are to be treated as laws of the state by the Federal Court, and are binding on the Federal Court.

Bucher vs. Cheshire Railroad Company, 125 U. S., 555; 31 Law Ed., 795.

Alcott vs. Bynum, 17 Wahl, 44; 21 Law Ed., 570.

Burges vs. Seligman, 175 U. S., 20; 27 L. Ed. 359.

Baltimore Railroad Company vs. Baugh, 149 U. S., 368; 37 Law Ed., 772.

Bacon vs. N. W. Railroad Company, 131 U. S., 258; 33 L. Ed., 128.

Upon the construction of the constitution of the State, the Federal courts as a general rule follow the decision of the highest courts of the state.

Supreme Lodge, Knights of Pythias, vs. Mayer, 198 U. S., 508; 49 L. Ed., 1146.

Bacon vs. Texas, 163 U. S., 207-221; 41 L. Ed. 132.

Hammond vs. Hastings, 134 U. S., 401.

Stettsman County vs. Wallace, 142 U. S., 293-306, 35 Law Ed. 1018.

First National Bank vs. Ayres, 160 U. S., 660-664, 40 L. Ed., 573.

Taylor vs. Beckman, 178 U. S., 548; 33 L. Ed. 909.  
 Forsyth vs. Hammond, 166 U. S., 506-518; 41 L.  
 Ed. 1095.

O'Connor vs. Texas, 202 U. S., 501-509; 50 L.  
 Ed., 1120.

Lambert vs. Barrett, 159 U. S. 660; 40 L. Ed. 296.  
 Shoshone Mining Company vs. Rutter, 177 U. S.  
 505-508; 44 Law Ed. 864.

When the construction of the constitution, or the statutes of a state has been fixed by the decision of the highest court of the state, the courts of the United States accept and apply it in cases before them.

Elwood vs. Marcey, 92 U. S., 289; 23 L. Ed., 710.

The federal courts respect the decisions of the state courts upon their constitution and statutes in the same manner as the state courts are bound by the decisions of the federal courts in construing the constitution, laws and treaties of the union.

Elmendorf vs. Taylor, 10 Wheat, 152; 6 L. Ed.,  
 289.

Smiley vs. Kansas, 196 U. S., 447-455; 49 L. Ed.,  
 546.

When a case is brought from the state courts in the United States Court, comity generally requires of the United States Court that in matters relating to proper construction of the laws and of its own states, the United States Court should follow the decision of the state court, and if a statute as construed by the state court is constitutional, the federal courts will follow its construction.

Soper vs. Lawrence, 201 U. S., 359-370; 50 L. Ed.,  
 788.



Tampa Water Works Company vs. Tampa, 199 U. S., 241; 50 Law Ed., 170.

Strickley vs. Highland Mining Company, 200 U. S., 527, 530.

Arcadia vs. State, 19 Wahl, 635; 22 Law Ed., 215.

And the federal courts will follow the construction of the constitution of the state given by the decision of the highest court, although the federal court may be of the opinion that the construction given by the state court is improper.

Forsyth vs. Hammond, 166 U. S., 506; 518; 41 L. Ed., 1095.

Iowa Central Railroad Company vs. Iowa, 160 U. S., 389; 40 L. Ed., 467.

It is immaterial whether such construction has been established by long usage or a judicial decision.

Carrol vs. Safford, 3 Howard, 441-460 11 L. Ed. 671.

The construction given the statute or constitution of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text.

Machine Company vs. Gage, 100 U. S., 676, 677; 25 L. Ed., 724.

Boserman vs. Blunt, 147 U. S., 647-654; 37 L. Ed., 316.

Bucher vs. Cheshire Railroad Co., 125 U. S., 555-582; 31 L. Ed., 795.

Morley vs. Lake Shore Railroad Company, 146 U. S., 162; 36 Law Ed., 925.

Fairfield vs. Gallatin County, 100 U. S., 47; 25 L. Ed., 544.

There is no sound distinction between the construction of a law enacted by the legislature of a state, and the construction of the organic law, ordained by the people themselves. The exposition of both belongs to the judicial department of the government of the state, and its decision is final and binding upon all the departments of that government and upon the people themselves, until they see fit to change their constitution; and the federal courts receive such a settled construction as a part of the fundamental law of the state.

Webster vs. Cooper, 14 How., 488; 504; 14 Law Ed., 510.

Meade vs. Portland, 200 U. S., 148; 50 L. Ed., 413.

As a matter of propriety and right the decision of the state courts, on the question as to what are the laws of the state, is binding upon those of the United States.

Aokes vs. Mose, 165 U. S., 363, 364; 41 L. Ed. 746.  
Wilkes County vs. Coler, 180 U. S., 506-520; 45 L. Ed., 642.

Talton vs. Mays, 163 U. S. 376, 385; 41 L. Ed., 196.

Railway Company vs. Whitten, 13 Wahl, 270-271; 20 L. Ed., 571.

Minnesota Iron Co. vs. Kline, 199 U. S., 593, 597; 50 L. Ed., 322.

It will be seen by the decisions cited herein that the federal courts should follow the rule laid down by the constitution, statutes and decisions of the highest courts of the State of Idaho.

Appellee, Hahn, had a lien, constitutional right or constitutional inhibition on the real, personal and mixed prop-

erty of said company, by virtue of the nature of his claim, on May 6, 1913, at the time of the death, adjudicated, September 23, 1914, by the judgment at the time of appointing the receiver on November 2, 1914, by virtue of the constitutional statutes and judicial decisions of the State of Idaho. Sec. 15, Article 11, Constitution of Idaho; Sec. 4462, Revised Statutes of Idaho, 1908.

Seymour vs. Boise Railroad Company, 24 Ida., 7.

And it cannot be said under the rule laid down, that appellee Hahn did not have a first and prior lien on all real, personal and mixed property of the Power Company, and especially so upon the property not covered by the mortgage, admitted to be of the value of \$45,000.00. Receivers only require possession of property subject to the existing liens, constitutional rights and constitutional inhibitions, and his possession or appointment does not devise a lien, constitutional right or constitutional inhibition previously acquired.

High on Receivers, 4 Ed., Sec. 138.

In re: Rogers, 125 Fed., 169.

Ryan vs. Rogers, 14 Ida., 309; L. C., 319; 94 Pac. 427.

The principal extends also to choses in action, which pass to the receiver by virtue of his appointment, and he takes them subject to existing liens thereon. For example: Where attorneys of a bank are employed to foreclose a mortgage and pending the foreclosure a receiver is appointed of the affairs of the bank, the receiver takes title to the mort-

gage, or its proceeds, subject to the lien which an attorney has for his fees, upon the papers of his client, as well as upon the proceeds of the litigation, and the attorneys will be required to pay to the receiver only the balance of the proceeds after deducting their fees.

High on Receivers, *supra*, 138.

Receivers' possession is possession of the party who is ultimately determined to be entitled to the property.

High, *supra*, 134-135.

## LIENS

A lien is a charge imposed upon specific property. It may be created by contract of the parties by constitutional provision, by statute, or by operation of law.

Kreling vs. Kreling, 118 Cal., 413; 50 Pac., 546-548.

The Menomnie, 36 Fed., 197-199.

United States Blowpipe Company vs. Spencer, 40 W. Va., 698; 21 S. E., 769-771.

Arnold vs. Porter, 122 N. C., 242; 29 S. E., 414-416.

Hines vs. Duncan, 79 Ala., 112-117; 58 Amer. Rep., 580.

A lien is a right of property and not a mere matter of procedure.

J. E. Rumbell, 13 Sup. Ct., 498-500; 148 U. S., 1; 37 L. Ed., 345.

It follows that the appellant Hahn, having a prior lien, constitutional right, or constitutional inhibition, on all the real, personal and mixed property of the Great Sho-



shone & Twin Falls Water Power Company, the judgment of the District Court should be affirmed, as to the appellee, Hahn.

Respectfully submitted,

JAMES H. WISE,

Solicitor for Appellee, C. J. Hahn, Administrator of the Estate of Harry M. King, deceased.

Residence and Office, Twin Falls, Idaho.



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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellant,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners.  
Appellees.

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
Appellant,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
Appellees.

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**REPLY BRIEF OF APPELLEE**

CARL J. HAHN, ADMINISTRATOR OF THE ESTATE OF HARRY M. KING, DECEASED, TO BRIEF OF AMERICAN WATERWORKS AND ELECTRIC COMPANY, A CORPORATION, APPELLANT.

Upon Appeal From the United States District Court for the District of Idaho, Southern District.

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JAMES H. WISE  
Residence: Twin Falls, Idaho,  
Solicitor for Carl J. Hahn, Administrator of Harry M. King.

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File

JUN 1 - 1911





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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Upon Appeal From the United States District Court for the District of Idaho, Southern District.

## STATEMENT OF CASE

(Note: Figures refer to pages of record.)

On the 6th day of May, 1913, and prior, deceased, Harry M. King, was in the employ of the Great Shoshone & Twin Falls Water Power Company, a public service corporation, engaged in generating, transmitting and distributing electric current in Ada, Elmore, Gooding, Owyhee, Lincoln and Twin Falls Counties, Idaho, and owned, controlled and operated an electrical distribution system throughout the aforesaid counties, and was the owner of a franchise to conduct said business in the aforesaid counties, the property of said company consisting of franchises, wires, poles and electrical apparatuses. On said date, the said deceased, while in the employ of the said company in the construction and repair of its line, under an uninsulated high tension power wire, charged with a dangerous and deadly current of electricity and while said deceased was in the employ of the defendant, under the orders, directions and command of the defendant's foreman, and while said defendant was in the operation and operating said plant, and while said deceased was performing his duties for said company, by reason of the negligence and carelessness of said company, the said deceased was severely shocked, burned and bruised, from which the said Harry M. King, deceased, died on the 6th day of May, 1913, and left surviving him, his widow, Katherine King, and his minor children, Margaret King, age eight years, and Alice King, age six years, and left no other child, or descendants of deceased child (89-90-91-92).

Carl J. Hahn, this appellee, was and now is the administrator of the estate of Harry M. King, deceased (88). On the 29th day of October, 1913, this appellee filed a suit in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Twin Falls against the Great Shoshone & Twin Falls Water Power Company for damages on account of the negligence, and carelessness of said company, which resulted in the death of said Harry M. King, deceased. Thereafter, said suit was moved to the District Court of the United States, District of Idaho, Southern Division. Issue was joined and trial had before a jury on the 23rd day of September, 1914, and verdict returned in favor of this appellee in the sum of \$5,590, together with costs and disbursements in the sum of \$174.35 (92-100).

On November 22, 1914, the Honorable F. S. Dietrich, Judge of the United States District Court, in and for Idaho, appointed William T. Wallace, receiver of the Great Shoshone & Twin Falls Water Power Company, to take charge of the property and assets of said company, and is now and at all times herein mentioned, has remained in charge of said company as receiver (94).

On the 1st day of May, 1910, the said Great Shoshone & Twin Falls Water Power Company issued a series of bonds not exceeding \$10,000,000.00, with interest at five per cent. payable semi-annually on the first day of May and November of each and every year. On November 2, 1914, the said defendant, Great Shoshone & Twin Falls Water Power Company, defaulted in the payment of interest on said mortgage and bond to the Equitable Trust

Company of New York, but permitted said company to continue in operation and possession of the property by and through a receiver (95).

On April 14, 1915, the Equitable Trust Company of New York started a foreclosure proceedings on the bond issue heretofore mentioned and set out (7 and 78). This appellee was made one of the parties defendant in said cause of action, and filed his answer May 15, 1915 (88 to 101, inclusive).

Said cause of action was tried in the United States District Court of Idaho, and decree of foreclosure entered on the 6th day of December, 1915 (189-210). The property was sold January 8, 1916 (214-215). In the decree of foreclosure the claim of Carl J. Hahn, administrator of the estate of Harry M. King, deceased, appellee was allowed as a preference right for the sum of \$6,225.15 (192).

The court ordered a special master appointed in the foreclosure suit to pay the full claim of said Carl J. Hahn (224-227) for \$6,225.15 and interest (242).

On October 27, 1915, at the hearing of the court on the foreclosure proceedings, the American Water Works Company was present in court by its attorney, Pasco B. Carter, and had full knowledge and notice of the proceedings that were taking place (229-238-247-301-315).

H. Hobart Porter is the president of the American Water Works and Electric Company; also president of the Great Shoshone & Twin Falls Water Power Company (238), and knew at the time that answering defendant, Hahn, and interveners Towle, Jake M. Shank and



Plummer & Scull were trying to establish a preference right, as afterwards ordered and decreed by the court, and at the time the court took the same under advisement, and on November 17, 1915 handed down an opinion, sustaining the contentions of answering defendant, Hahn, and interveners Towle, Shank, Plummer & Scull (177 to 187 inclusive). Afterwards it was stipulated that the property might all be sold at one and the same time (187-188), and thereafter stipulated that the property not covered by said mortgage and to be placed in the fund (sometimes called the "Unsecured Creditors' Fund"), was of the value of \$45,000.00 (211). Thereafter, the sale of said property was duly confirmed (215), and the claims of the answering defendants and interveners entered paid (242).

The American Water Works Company at this late date undertakes to intervene (269) into a purse of \$45,000.00 with a claim of \$1,268,434.66; the petition of the intervenor comes too late.

### ARGUMENT

The Revised Statutes of Idaho provide:

"Sec. 4111: Any person may before the trial, intervene in an action or proceedings, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both \* \* \* by leave of court. The intervention must be before the trial."

The complaint in intervention filed after the joinder of issue on demurrer and submission of the cause thereby is too late.

People vs. Green, 1st Ida., 235, l. c. 238.  
Hocker vs. Kelley, 14 Cal., 164.

Rockwell vs. Coffey, 20 Colo., 400.

Gale vs. Frasier, 4 Dak., 206.

Smith vs. Gale, 144 U. S., 520.

The right to intervene is a question of sound discretion of the court.

Smith vs. Gale, 144 U. S., 520.

The discretion of the chancellor in refusing to allow intervention in a suit will not be reviewed by the appellate court.

Gunnerson vs. Illinois Trust Company, 100 Ill. App., 401; affirmed 199 Ill., 422.

The appellant, American Water Works and Electric Company, a corporation, a proposed intervenor, is not injured by any action taken by the answering defendants and intervenors in the foreclosure suit. For example: If the answering defendant, Hahn, and intervenors, Shank, Towle, Plummer and Scull, had not intervened, all the proceeds of the \$45,000.00 of personal property would have gone to the Equitable Trust Company in satisfaction of its mortgage indebtedness. The appellant, American Water Works and Electric Company, will receive the same amount out of the funds in the hands of the receiver, and the claims against the receivership of answering defendant Hahn and intervenors will be reduced in that amount. Therefore, the appellant is not injured by the action of the District Court in allowing the claims of the answering defendant, Hahn, and intervenors have a priority of certain property of the Great Shoshone & Twin Falls Water Power Company (306).

It follows that the appellant, American Water Works

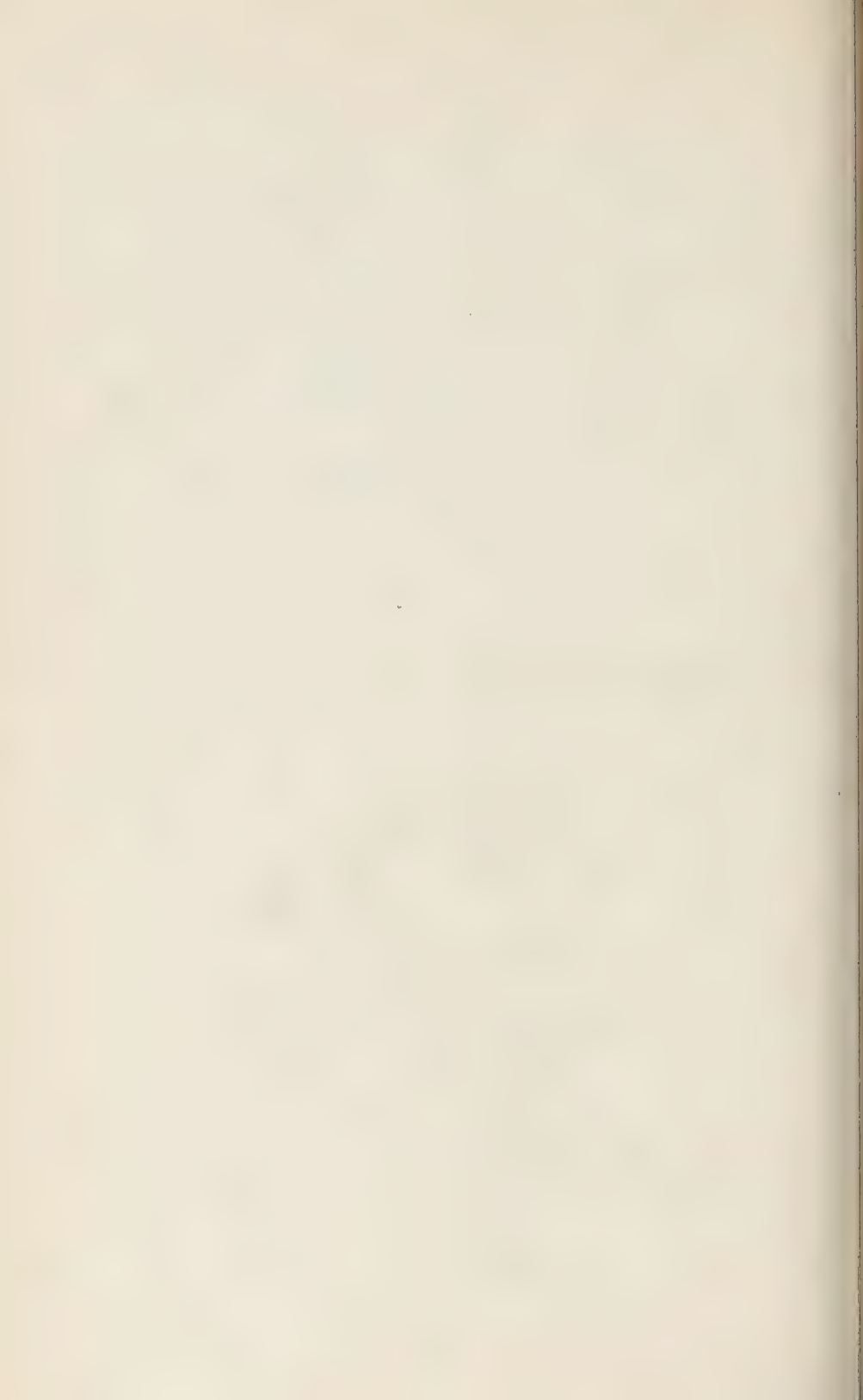
& Electric Company, is not injured by any actions taken by the answering defendant Hahn, and other interveners. and its application for intervention comes too late. The action of the District Court should be affirmed.

Respectfully submitted,

JAMES H. WISE,

Solicitor for Appellee, C. J. Hahn, Administrator of the Estate of Harry M. King, deceased.

Residence and Office, Twin Falls, Idaho.





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**United States**  
**Circuit Court of Appeals,**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
*Appellant,*

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, Interveners,  
*Appellees.*

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, Intervener,  
*Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, Interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
*Appellees.*

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**REPLY BRIEF**

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*Upon Appeal from the United States District Court  
for the District of Idaho, Southern Division.*

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MURRAY, PRENTICE & HOWLAND,

Residence: New York, N. Y. JUN 26 1916

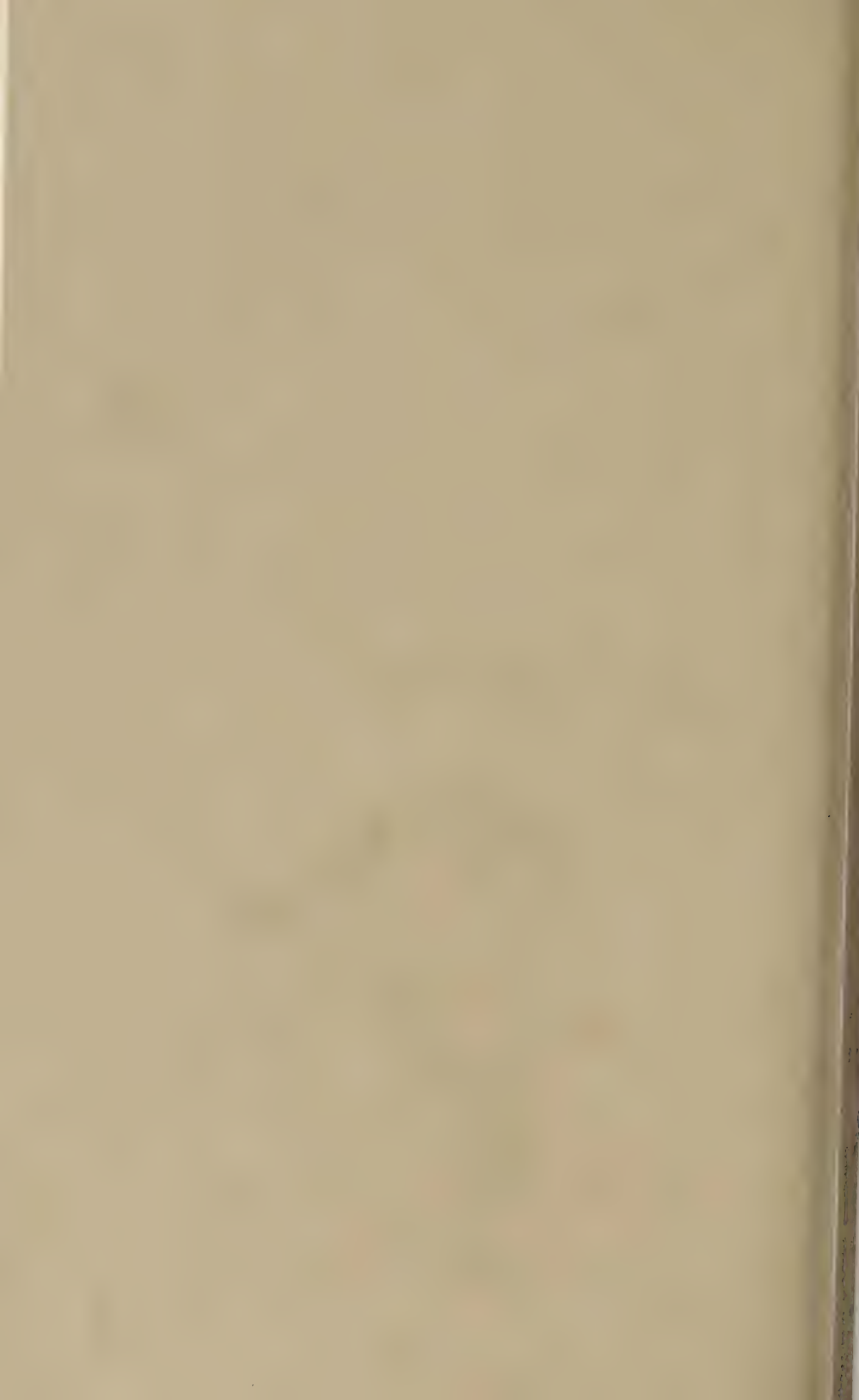
RICHARDS & HAGA,

J. L. EBERLE,

Residence: Boise, Idaho.

*Solicitors for The Equitable  
Trust Company of New York.*

**F. D. Monckton,**  
**Clerk.**



**United States**  
**Circuit Court of Appeals**  
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*Appellees.*

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, Intervener,  
*Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, Interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
*Appellees.*

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**REPLY BRIEF**

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*Upon Appeal from the United States District Court  
for the District of Idaho, Southern Division.*

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MURRAY, PRENTICE & HOWLAND,

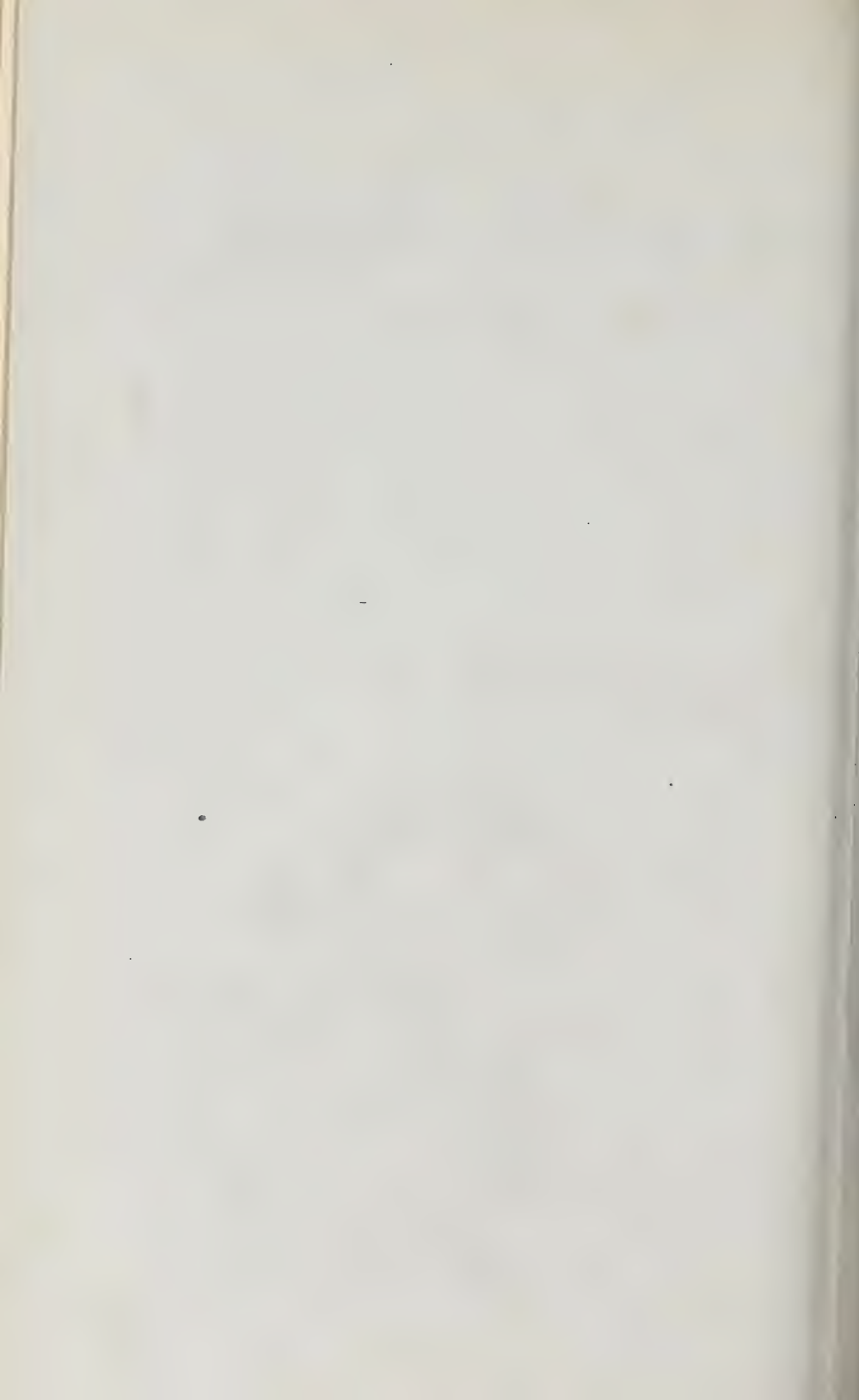
Residence: New York, N. Y.

RICHARDS & HAGA,

J. L. EBERLE,

Residence: Boise, Idaho.

*Solicitors for The Equitable  
Trust Company of New York.*





United States  
Circuit Court of Appeals

For the Ninth Circuit.

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THE EQUITABLE TRUST COMPANY OF NEW  
YORK, *Appellant,*

vs.

GREAT SHOSHONE AND TWIN FALLS WA-  
TER POWER COMPANY, et al., *Appellees.*

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AMERICAN WATER WORKS AND ELECTRIC  
COMPANY, *Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, et al.,  
*Appellees.*

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REPLY BRIEF

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*Upon Appeal from United States District Court for  
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Upon the conclusion of the oral argument, leave was granted the appellants to file a reply brief, after the appellee, Jake M. Shank, had submitted the additional authorities and filed the supplemental brief which said appellee was given permission to file.

*Appellees Have Erroneously Applied Principles Applicable Only to Judgment Creditors' Suits.*

Appellees have fallen into the fatal error of attempting to sustain their position by the application of principles and the citation of authorities limited exclusively to *judgment creditors' suits*, and it would seem unnecessary to do more in this reply brief than to review briefly the vast difference between judgment creditors' suits and a general creditors' suit such as the suit of Guy I. Towle against Great Shoshone and Twin Falls Water Power Company, brought by appellee Towle on behalf of himself and all other creditors, secured and unsecured, and in which the Court appointed a receiver for the benefit of all creditors, to the end that all the assets of the debtor might be conserved and administered for the equal and pro rata benefit of all having an interest in the assets.

The Court in appointing the receiver followed the usual custom of enjoining all creditors and all other persons "from interfering with, attaching, levying upon, seizing, or in any manner whatsoever disturbing any portion of the properties, rights and franchises of the defendant, or taking possession thereof, or in any manner interfering with the same, or any part thereof, without the consent of the Receiver, and from interfering in any manner with or preventing the discharge by said Receiver of his duties or his operation and management of said property and premises under the order of this Court" (Rec. 172), to the end that the assets of the debtor

might be administered and distributed to the creditors according to their respective rights and priorities as they existed at the time of the appointment of the Receiver.

We submit that it is fundamental that where the purpose and object of a suit is for the appointment of a chancery receiver to marshal the assets and hold and manage the same for the preservation and protection of all creditors and of every interest therein, no one creditor or class can, by virtue of the appointment of such receiver, acquire a right to defeat any other creditor or class unless such right existed prior to the appointment of the receiver.

(See authorities cited, p. 20 and pp. 78-87 of this appellant's original brief.)

The only answer that appellees can make to this proposition is to quote from and cite authorities relating to judgment creditors' suits, to the effect that courts of equity have in proper proceedings for such purpose aided such creditors in enforcing their judgments where the remedy at law was clearly inadequate. Appellees have failed to cite a single authority sustaining their contention that after the Court has appointed a receiver in a general creditors' suit and taken jurisdiction and possession of all the assets, it will entertain what they say corresponds to a judgment creditors' suit on behalf of a few of the creditors who previously had no preference, and take from the receiver sufficient of the assets to pay such creditors in full. This proposition is both anomalous and unheard of; it is, if anything, even more unsound

than the "Right of Discovery" upon which appellees sometimes rest their claim to the fund in controversy.

As stated before, this erroneous conclusion is reached by applying to this suit the principles which have always been limited in their application to judgment creditors' suits. Relief in such cases is afforded the judgment creditor in aid of an inadequate remedy at law. The authorities on the subject are fully discussed in the notes to *Ziska v. Ziska*, 23 L. R. A. (N. S.) 1. On page 7 the annotator says:

"There are two classes of cases in which a judgment creditor is permitted to come into a court of equity for relief. First, in aid of his execution at law, as to set aside an encumbrance or a transfer of property made in fraud of creditors. The issuing and levy of the execution gives the complainant a lien upon the property, but he is compelled to come into a court of equity for the purpose of removing some obstruction fraudulently interposed to prevent a sale on execution. In this class of cases he may come into court immediately after he has obtained a lien by the levy of his execution, and, the obstruction being removed, he may proceed to the sale of the property under his execution, and subject the proceeds thereof to the payment of his debt. Second, to have his judgment paid out of choses in action, or other property of the debtor which cannot be reached by execution at law. Relief is given in these two classes of cases on different principles—in the first class on the ground of fraud, in the second on the ground that the complainant has exhausted his remedy at law and that it is



inequitable and unjust for the debtor, under such circumstances, to refuse to apply any choses in action, or other property belonging to him which cannot be reached by execution at law, in payment of the judgment."

Clearly, appellees are not judgment creditors, and if they were, the Court could not do the inconsistent thing of first taking possession of all the property in a general creditors' suit and then become active on behalf of a few of the creditors and in their behalf undo what it had undertaken to do in the general creditors' suit in behalf of all.

Typical of the cases cited by appellees is the case of *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 710, 28 L. ed. 301, quoted from at length on page 11 of Shank's brief, and from which counsel read to the Court during the oral argument. In that case it appeared that on June 1, 1877, one Dodge conveyed his property in trust as security for certain promissory notes; that on January 4, 1878, the appellee Earle obtained a judgment against Dodge on which a *fi. fa.* was issued April 9, 1879, and returned *nulla bona*. On April 10, 1879, the appellee Earle filed his bill in equity against Dodge and the trustees under the trust deed, the object and prayer of which were to take an account of the debt secured by the trust deed and, subject thereto, to have the premises sold and the proceeds of the sale applied to the satisfaction of the appellee's judgment. A decree was entered on June 11, 1879, in accordance with the prayer of the bill. On December 27, 1879, the appellants filed a petition in the cause, setting

forth the recovery of a judgment in their favor against Dodge on February 11, 1879, and praying that they be made parties complainant in the cause, and that the real estate which had been conveyed in trust, as aforesaid, be subjected to the satisfaction of their judgment; that the same be sold, and the proceeds of sale brought into court and distributed according to law. The sole question was whether the proceeds of the sale should be applied first to the satisfaction of the prior judgment of Earle who had filed the original suit and first sought the aid of equity for the enforcement of his judgment, or whether the proceeds should be applied pro rata between Earle who held the first judgment and the appellants who had acquired a subsequent judgment and who were allowed to intervene in the suit some six months after a decree had been entered in favor of the appellee Earle. The Court, after reviewing the authorities bearing upon the rights of courts of equity to aid judgment creditors in the enforcement of their judgments where the legal remedy was insufficient, says:

“It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no special lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose, *dates from the filing of the bill.*” (Our italics.)

In that case the property was not in the custody of the Court in a general creditors' suit to be administered for the benefit of all creditors, and the Court simply applied the rule that the appellee Earle having a prior judgment and having first filed his bill seeking the aid of the Court for the enforcement thereof and obtained his decree on June 11, 1879, and the appellants not having filed their bill seeking the aid of the Court for the enforcement of their judgments until December 27, 1879, Earle had the same priority in equity that he would have had in law, had his legal remedy for the enforcement of his judgment been adequate. The appellee had acquired a prior right and the lien of his judgment was held to date from the filing of his bill, which is undoubtedly the correct rule in judgment creditors' suits. But the purpose of such a suit is the very opposite of a general creditors' suit.

Could it be contended for a moment that after the Court had taken possession of the property in the Towle suit, it could also entertain a judgment creditors' suit to subject all or part of the property in the possession of the Receiver to the satisfaction of a claim of a judgment creditor who could not enforce his judgment by the usual remedies at law? To ask the question is to answer it. Yet in the case at bar that is really what was done, although the appellees are not even judgment creditors. Besides, they had intervened in the general creditors' suit and sought the aid and benefit of that suit, and it is by virtue of rights acquired in that suit that they were permitted

to intervene in the foreclosure suit and contest the mortgage.

As stated above, the situation is most anomalous, and we respectfully submit it is without either precedent or authority and is directly contrary to principles so fundamental and so well established that we shall not attempt to review further the cases cited by appellees on this point.

It seems clear, therefore, that the appellees could not be permitted to intervene in the foreclosure suit and acquire rights in that suit superior to the Receiver or antagonistic to the rights of other creditors. Yet that is exactly what the trial court held that the appellees did do and could do, for it held that the Receiver could not make the defense on behalf of all the creditors which these few favored creditors were permitted to make in their own behalf. It is equally clear that it was by virtue of the receivership proceedings that appellees had acquired the superior equities or status that enabled them, in the opinion of the Trial Court, to attack the mortgage and to acquire for their own exclusive use property which, if not subject to the mortgage, should have been turned over to the Receiver for the benefit of all creditors; and this is undoubtedly the only basis on which appellees feel their position can be sustained, for in their original brief (p. 55) they say: "There can be no real doubt in any fair mind but that a creditor who has had his claim allowed and approved in receivership or insolvency proceedings has the equivalent of a judgment." Having obtained the allowance of their claims in the receivership proceed-



ings, appellees' position, therefore, is that they have the equivalent of a judgment and that they might therefore invoke the aid of the Court, as in the case of a judgment creditors' suit, to secure for themselves, in satisfaction of their alleged judgment, the property of which the Court had taken possession for the benefit of all creditors.

*Appellees Could Not Intervene as General Creditors.*

It is true that appellees at times appear to argue that they had the right to attack the mortgage wholly independent of the receivership proceedings and as mere unsecured general creditors, but on that point the authorities cited in our original brief (pp. 17, 18, 54, et seq.) are conclusive, and as that point has been decided squarely against appellees by the Supreme Court of the State, that construction will be followed by the Federal Courts.

To meet this situation appellees cite the case of *Union Trust & Sav. Bank v. Idaho Smelter and Refining Co.*, 24 Ida. 735, but that was a case where a creditor as assignee of certain judgments sought to intervene in a foreclosure suit for the purpose of defeating the mortgage by showing that the bonds alleged to be outstanding had been fraudulently and illegally issued and that there was therefore no indebtedness, and hence the property should not be taken by the mortgagee under foreclosure. The contest there was not over the mortgage but whether the indebtedness was fraudulent and illegal because the mortgagor had violated certain constitutional and statutory provisions in issuing bonds or creating

an indebtedness in a manner prohibited by law. We think there can be no question but that creditors in the case of an insolvent company may be permitted to show that the indebtedness for the satisfaction of which the property is about to be sold is fraudulent and fictitious. Clearly, in such cases a court of equity could afford appropriate relief where the debtor himself is a party to the fraud and fails to set up available defenses, but the rule which would apply in such cases can have no application here. Appellees have never questioned the validity or the amount of the indebtedness secured by this appellant's mortgage. The complaints in intervention or answers of the appellees admit that this appellant is entitled to a judgment for the amount of its outstanding bonds and accrued interest, and the contest was solely upon the point as to whether it could foreclose upon certain personal property in view of the failure to file the mortgage as a mortgage on personal property and in view of the omission of the affidavit required in such cases. But under the statutes of Idaho and the decisions of its highest Court, the mortgage was valid as between the parties and it could not be contested except by someone who had an interest in the property by lien or attachment. (See pp. 59-60, this appellant's original brief.)

*Right of Appellees to Intervene May Be Questioned  
on Appeal.*

The appellee Shank in his brief contends that the motion to dismiss the complaint in intervention and to vacate the order permitting said appellee to inter-

vene and to strike what is denominated the answer of said appellees, is too general, and that the order overruling such motion is not subject to review. We think a sufficient answer to that contention is a reading of the motion (Rec. pp. 139-140). Among other things, the motion states: "That the said petition is wholly insufficient in law and equity, and does not set forth facts sufficient to entitle said petitioner to intervene or be made a party defendant in said cause", and that the answer should be stricken from the files "for the reason that it appears therefrom that said intervenor has not such interest in this litigation as to enable him to intervene or be made a party defendant in said cause, and the matter set forth in said alleged answer does not constitute a proper defense to complainant's bill of foreclosure, and the allegations therein contained do not set forth matters sufficient to disentitle complainant to the relief sought in the bill." The order overruling the motion was deemed excepted to and no reply was necessary to the answer for the new or affirmative matter set forth therein was deemed denied under equity rule No. 31.

But if it be held that the Court did not err in permitting appellees to intervene, the question still remains whether they had such interest in the property as to entitle them under the laws of the State of Idaho to contest this appellant's mortgage, and if so, whether the proceeds from the property thus obtained from under the mortgage should be devoted to the payment of appellees' claims in full, or whether they

should be turned over to the Receiver for disbursement in the general creditors' suit according to the principles governing the distribution of assets in such cases.

*Appellant Is Entitled to Appeal Before a Deficiency Judgment Is Entered.*

It is also contended by appellees that a deficiency judgment has not yet been entered in favor of appellant, and that therefore it cannot object to the erroneous decree, or to the errors of the Court committed during the trial. We know of no rule that prohibits a mortgagee from seeking a review of the errors committed against it in the trial of the foreclosure suit and of the errors which appear in the decree, until after it has enforced the decree and obtained a deficiency.

In the case at bar, by stipulation and orders of the Court, it was practicable to proceed with the enforcement of the decree before the appeal was determined, for the errors complained of were of such a character that a modification of the decree on appeal could be as effectively applied to the proceeds of sale as to the property before sale, and it was therefore to the interest of all parties to terminate the receivership as early as possible, sell the property, and wage the contest over the division of the proceeds.

The proposition that appellant might not be entitled to judgment for the face of the outstanding bonds with interest, was advanced by the Court and not by appellees, but in order not to delay the sale of the property and the termination of the receiver-



ship, the decree provided (Rec. p. 208) "that the Court reserves jurisdiction and power to hereafter determine the amount due from the Power Company to the several holders of said bonds and coupons," and also (Rec. p. 209) "that in case there shall be any deficiency in the amount required to be paid in full of the several amounts directed and allowed to be paid, then the Special Master shall report to the Court the amount of the deficiency." In the order confirming the sale (Rec. p. 223) it is provided that: "The Court further retains jurisdiction of the cause for the purpose of determining the amount of the deficiency, if any, to which complainant may be entitled."

This appellant in its assignment of errors raised the point that the Court should have entered a decree on the record before it for the full amount of bonds outstanding and accrued interest thereon, and that there was no occasion for taking further proof on that point; but in order to shorten the record on appeal and secure a speedy settlement of the statement so that the cause might be heard at this session of the Circuit Court of Appeals, appellant waived its assignment of error on this point.

There is not the slightest basis for the contention of appellees that appellant has waived its right to a deficiency. The reservations made by the Court in the decree and order of confirmation show conclusively that there has been no such waiver, and while judgment must eventually be entered for the full amount of the bonds outstanding—\$2,230,000, with

interest from May 1, 1914, thus leaving a deficiency of several hundred thousand dollars, as the property was sold for two million dollars, from which must be deducted \$45,000, the value of the personal property which the Court held was not subject to the mortgage, and the costs and disbursements of the Trustee and the fees of the Trustee and its counsel. But if for any reason it should be held that judgment should only be for the notes issued, viz., \$1,780,000, and for the \$5,000 of bonds which had been sold to the public without first being pledged as security for the notes, and accrued interest, the amount due would still be in excess of the available proceeds, so in any event there would be a substantial deficiency.

*If This Appellant Is Not Entitled to Deficiency Then  
Appeal of American Water Works and Electric  
Company Must Be Sustained.*

The fallacy of appellees' position most clearly appears in connection with their argument as to the deficiency judgment. The Trial Court denied the American Water Works and Electric Company the right to intervene, for the reason that the money which was ordered paid to appellees was taken from the mortgagee—this appellant—and not from the creditors, and that has always been the contention of appellees as to why they should not be required to pro rate with other creditors. They have plausibly argued that they took nothing from other creditors but that what will be paid them would be taken from the mortgagee. The fallacy of this position is clearly brought out in their contention that the mortgagee

has been paid in full out of the balance of the property. If that be the case, then clearly the \$45,000, realized from the sale of the personal property which the Court held was not subject to the mortgage, would be surplus which the Special Master should pay to the mortgagor or its Receiver for disbursement in the general creditors' suit among all the creditors. Hence, if appellees contend that there is and can be no deficiency because this appellant has been paid in full, then the appeals of the American Water Works and Electric Company and other creditors must necessarily be sustained, for they will clearly be deprived of their pro rata share of the surplus from the sale of the mortgaged assets of the insolvent debtor.

*Relation of Appellants to Each Other Does Not Affect the Rights of Appellees.*

The contention of this appellant that its mortgage is a lien upon all the personal property, is necessarily adverse to the contention of the other appellants, but if for any reason the Court should conclude that the Receiver or the appellees were entitled to contest the lien of this appellant's mortgage as to such personal property, then we submit that we are entitled to share, to the extent of our deficiency, pro rata with all other creditors of the Power Company, and to that extent we are in entire accord with the appeals of the American Water Works and Electric Company and other creditors. But we deem it wholly unnecessary to reply to the unwarranted and gratuitous charges of collusion contained in the briefs of appellees. The

record does not furnish the slightest foundation for such statements.

It is true that the owners of the first mortgage bonds as part of the plan of re-organization have lately negotiated for the purchase of the claims of the American Water Works and Electric Company, but surely that cannot destroy or change the legal status of the claims. It cannot be that the unsecured claim of the American Water Works and Electric Company should be paid if owned by one party and repudiated if owned by another.

Much has been said in appellees' briefs about the circumstance that H. Hobart Porter, president of the Power Company, telegraphed from his office in New York to counsel for the Power Company at Boise regarding the appearance and the filing of an answer by that Company in the foreclosure suit. The reason for doing so is apparent. It was to the interest of all creditors and the Power Company that the proceedings in the case should be regular, to the end that the property might be sold under an assurance of good title passing to the purchaser under the sale, and up to that time the Power Company had simply entered an appearance in the case without filing its answer, and counsel for the Company was not present at the trial. Believing that possible objections might be raised to the title under such circumstances and that there might be delays and complications resulting from the necessity of taking a decree *pro confesso* as against the Power Company, the president of that Company upon being advised by complainant that the Power Company was doing itself



as well as its creditors an injustice by not appearing at the trial, advised the solicitor for the Company to appear in the case, and as the Company concededly had no defense whatever to the mortgage or the suit for foreclosure, it did the honorable and only thing which it could consistently do, viz., it filed an answer admitting the allegations of the complaint, as it had previously done in the general creditors' suit brought by Guy I. Towle. It should be noted also that this telegram was sent by the president from New York on Tuesday, October 26th, when he could not have had any knowledge or information of the interventions which had been permitted the preceding day on behalf of Shank and on late Saturday afternoon on behalf of Plumer, Scull and Towle.

The fact that Mr. Porter is also president of the American Water Works and Electric Company can be of no importance, for manifestly that Company cannot be charged with notice of what is done by the Power Company or by Mr. Porter as president of that Company. That the American Water Works and Electric Company knew that the mortgage of complainant was being foreclosed is admitted, but there is not the slightest foundation for the charge on the part of appellees that it also knew of their intervention or of the provisions of the decree relative to the payment of the claims of appellees in full, until after the decree had been entered. On that point it would seem that the statements in the verified petition to intervene must be accepted as true until overcome by proper evidence on a hearing for such

purpose. The statements of appellees to the contrary are apparently as well founded as the repeated statements that all other creditors of the Power Company were satisfied with the decree and its provisions for the distribution of the Unsecured Creditors' Fund, whereas a number of other creditors—Thousand Springs Power Company, Intermountain Electric Company, Guaranty Trust Company of New York and American Water Works and Electric Company—had tried in vain to get the Receiver to appeal and to get the Trial Court to allow an appeal on behalf of the Receiver so that the rights of all creditors might be protected, and it became necessary for such creditors to apply to this Court for the allowance of their appeal in order that their rights might be saved and protected before the time for appeal expired.

This appellant refers to these matters simply to the end that the Court may not be misled by statements and charges in the briefs of counsel not supported by the record and to the end that the case may be disposed of on its merits and each creditor receive what he is entitled to under the law and the principles of equity governing the administration of assets of insolvent debtors.

Respectfully submitted,

RICHARDS & HAGA, and

J. L. EBERLE,

Solicitors for Appellant, Equitable Trust Company of New York, Trustee.

Residence: Boise, Idaho.

United States  
Circuit Court of Appeals  
For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, *Appellant*,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners, *Appellees*.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener, *Appellant*,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, *Appellees*.

BRIEF OF INTERVENER, JAKE M. SHANK

*Upon Appeal from the United States District Court for the District of Idaho, Southern Division.*

ALFRED A. FRASER,  
*Solicitor for Intervener, Jake M. Shank.*

Filed

JUN 17 1916

F. D. Monckton,  
Clerk.





United States  
Circuit Court of Appeals  
For the Ninth Circuit

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, *Appellant*,

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners, *Appellees*.

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener, *Appellant*,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913, *Appellees*.

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BRIEF OF INTERVENER, JAKE M. SHANK

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*Upon Appeal from the United States District Court for the District of Idaho, Southern Division.*

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As the statements of facts in this case have been set out quite fully in the briefs heretofore filed in this action, we shall confine ourselves to a discussion of the principal assignments of error relied upon by the appellants.

We assume that the principal assignments of error relied upon by the appellant, The Equitable Trust Company of New York, raises the question as to the right of an unsecured or general creditor to intervene in the foreclosure proceedings, and by such intervention attack the validity of the mortgage or trust deed, and The Equitable Trust Company being an only party to the action who could raise this question if this assignment is not well taken as to this particular appellant it is eliminated.

First, we call the Court's attention to the fact that there is nothing in the record which affirmatively shows that this question was presented in the trial court. A motion was made in the trial court by The Equitable Trust Company to dismiss the petitions in intervention, but this motion was general in its terms and did not specifically point out or set forth as one of the reasons for such dismissal the fact that the interveners were general creditors who had not exhausted their remedy at law. These motions were by the Court overruled. The record does not show that any exceptions were taken to this ruling of the Court. The record does show that after these motions were overruled, it was stipulated on behalf of The Equitable Trust Company that the allegations of the petitions of intervention should be deemed to be denied. In other words, it filed a general answer, and in this answer they did not set forth these matters as a matter of special defense as required by the equitable rules.

The trial court in its opinion uses language which would indicate that this question was discussed in some

form or other during the trial of this case, but the opinion of the trial court is not part of the record, and in this case if the Court had omitted to prepare or file an opinion, then the record would be silent upon this question.

This objection does not go to the jurisdiction of the Court, and is waived if not presented seasonably. In the case of *Hollins v. Iron Co.* 150 U. S. 371; 14 Sup. Ct. 127, the effect of a failure to bring such an objection seasonably to the attention of the Court is thus stated on page 380, 150 U. S. and page 128 Sup. Ct.

"It is urged, however, that this court has sustained the validity of proceedings and decrees in suits of this nature in which it appeared that the plaintiffs had not exhausted their remedies at law; and the cases of *Sage v. Railroad Co.* 125 U. S. 361, 8 Sup. Ct. 887, and *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, are cited as illustrations. But, passing by other matters disclosed by the facts of those cases, it will be noticed that in neither of them was the objection made at the outset, and when action on the part of the court was invoked. Defenses existing in equity suits may be waived, just as they may in law actions; and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. Take the present case as an illustration. Suppose the corporation and other defendants had made no defense, and without expressly consenting, had made no objection to the appointment of a receiver, and the subsequent distribution of the assets of the corporation among its creditors; it cannot be doubted that a final decree providing for a settlement of the affairs of the corporation and a distribution among creditors could

not have been challenged on the ground of a want of jurisdiction in the court, and that notwithstanding it appeared upon the face of the bill that the plaintiffs were simple contract creditors, because the administration of the assets of an insolvent corporation is within the function of a court of equity, and, the parties being before the court, it has power to proceed with such administration. If there was a defense existing to the bills as framed,—an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted,—it was a defense and objection must be made in limine, and does not of itself oust the court of jurisdiction. This doctrine has been recognized, not merely in the cases cited, but also in those of *Reynes v. Dumont*, 130 U. S. 304, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594; *Brown v. Iron Co.* 134 U. S. 530, 10 Sup. Ct. 604. None of these cases question the proposition that, if the objection is seasonably presented, it will be effective.”

*Temple v. Glasgow*, 80 Fed. 441.

*Foltz v. St. Louis & S. D. R. Co.* 8 C. C. A. 641;  
60 Fed. 322.

*Union R. R. Co. v. Martin*, 12 C. C. A. 601.

*Atlantic Trust Co. v. Dana*, 62 C. C. A. 673; 128  
Fed. 225.

Conceding the general rule to be that a general creditor must first reduce his claim to judgment and have an execution returned nulla bona before he is in a position to attack a transfer of his debtor's property, yet this rule is not absolute, and when such a proceeding would be vain and involve useless expense, the law will not demand it.

In *Case vs. Beauregard*, 101 U. S. 688; 25 L. Ed. 1004, the Supreme Court said:

“It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the pay-



ment of the debt must show that all remedy at law had been exhausted. And generally, it must be averred that judgment has been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he has done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without a remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity required a meaningless form. '*Bona, sed impossibilia non cogit lex.*' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility the issue of an execution is not a necessary prerequisite to equitable interference." (Citing authorities.)

In the case of *Alder Goldman Commission Company et al. vs. Williams et al.* 211 Fed. 531, the Court said:

"The general rule prevailing in the national courts, as well as in courts of equity generally, is well established that, to maintain a creditor's bill to set aside a fraudulent conveyance, the creditor must have reduced his claim to judgment, and have an execution issued upon the judgment and returned unsatisfied. The reasons upon which this rule is based, as enunciated by the different courts which have passed

upon that question, are, (1) A debtor is entitled to a trial by jury for the purpose of determining the correctness of the demand, and there can be no jury trial in a court of equity; (2) to justify the interposition of a court of equity, the remedy at law must have been exhausted, and that can be shown by proof that a judgment had been obtained, an execution issued thereon, and returned nulla bona; (3) the existence of a lien upon the property, or interest in the property, created either by contract or by a judgment which is a lien.

"As to the right of a trial by jury to have the validity of the demand determined, it is sufficient to say that the justice of the demands is not questioned. The motion to dismiss admits them. That being the case, there is nothing to submit to a jury, and equity never requires a useless thing to be done. A creditor need not reduce his claim to judgment where the correctness of the claim is admitted or not denied. *D. A. Tompkins Co. v. Catawba Mills* (C. C.) 82 Fed. 780; *Neiters v. Brockman*, 11 Mo. App. 600; *Cohen v. Morris*, 70 Ga. 313.

"As to the second ground the courts have established several exceptions to the general rule. One of them is that when it is shown that it is impossible or impracticable to obtain a judgment, another if a judgment has been secured, there is no property which can be subjected to an execution. Still another exception is when the property has been fraudulently conveyed by the debtor, then the remedy at law is wholly inadequate, and a resort to equity may be had. Thus, it has been held that the issuance of an execution is not a necessary prerequisite to a creditor's bill when it appears that a debtor has no property which is subject to an execution at law and the issuance of the execution would be of no practical utility. *Sage v. Memphis & Little Rock R. R. Co.* 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694; *Johnson v. Powers*, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; *Talley v. Curtain*, 54 Fed. 4, 4 C. C. A. 1771; *Schofield v. Ute Coal & Coke Co.* 92 Fed. 269, 34 C. C. A. 334; *Iazarus Jewelry Co. v. Steinhardt*, 112 Fed. 614, 50 C. C. A. 393.

"As stated in *Sage v. R. R. Co.*, *supra* :

"When the suing out of an execution would be an idle ceremony, causing useless expense and being of no real benefit to the plaintiff, it is unnecessary."

"The courts almost universally recognize the rule that where the recovery of a judgment at law is impracticable, it is not an indispensable requisite to a creditor's bill. *Kennedy v. Creswell*, 101 U. S. 641, 645, 25 L. Ed. 1075; *Case v. Beauregard*, 101 U. S. 688, 690, 25 L. Ed. 1004; *Mellen v. Moline Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; *National Tube Works v. Ballou*, 146 U. S. 517, 523, 13 Sup. Ct. 165, 36 L. Ed. 1070; *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; *Hibernia Insurance Co. v. St. Louis & New Orleans Trans. Co.* (C. C.) 10 Fed. 596; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* (C. C.) 45 Fed. 7; *Guaranty Title & Trust Co. v. Pearlman* (D. C.) 144 Fed. 550."

In the case of *Talley v. Curtain et al.* 54 Fed. 43, a case decided in the Circuit Court of Appeals of the Fourth Circuit, the Court in the syllabi say:

"A creditor's bill to set aside an assignment of all the debtor's property for the benefit of creditors may be maintained though plaintiff's claim has not been reduced to judgment, when such claim is recognized and provided for in the deed of assignment, and is not disputed by the pleadings, since it is obvious that a judgment and execution would afford no remedy at all, and that there is no remedy at law. 46 Fed. Rep. 580, affirmed.

"The debt being thus solemnly admitted by all parties, and the principal question being as to the validity and construction of the trust created by the deed of assignment, equity jurisdiction cannot be defeated on the ground that, the claim being for a money payment exceeding \$20, the defendants are entitled to trial by jury under the seventh amendment to the constitution of the United States. 46 Fed. Rep. 580, affirmed. *Scott v. Neely*, 11 Sup. Ct. Rep. 712, 140 U. S. 106, distinguished."

If the trial court did err in permitting general creditors to intervene in this proceeding, it was error without prejudice for the reason that the appellants, The Equitable Trust Company, expressly waived the assignment of error covering this question. The assignment of error No. 15 is as follows:

“Because the court erred in not entering judgment in favor of the complainant for the full amount of the bonds issued and outstanding, to-wit: \$2,230,000 with interest from the first day of May, 1914, at the rate of 5 per cent per annum. (Transcript page 254)”

And the statement as settled by the trial judge contains the following:

“Before settling the statement, counsel for appellant expressly waived its last assignment of error (No. 15) and therefore, the statement is not made complete relative to the point therein involved.” (Transcript page 176.)

The trial court in the decree in this case reserved the right to thereafter determine the amount due the said Equitable Trust Company, as trustee for the bondholders. (Transcript page 208.) So the record at the present time discloses the fact that The Equitable Trust Company has expressly waived this question, and if the same was not waived, there is nothing in the record to show that The Equitable Trust Company has any deficiency judgment or that it ever will be entitled to one, and it was admitted by counsel for The Equitable Trust Company upon the argument that they had not as yet procured any deficiency judgment.



But even conceding, for the sake of argument, that The Equitable Trust Company had a deficiency judgment, we insist that the lien of such judgment would be inferior to the lien of these interveners to the proceeds of the \$45,000 involved in this proceeding. In fact, we contend that The Equitable Trust Company occupies a more unfavorable position than any other creditor seeking to pro-rate with these interveners in this case, for the reason that The Equitable Trust Company not only did nothing to assist in uncovering and obtaining this \$45,000 for the creditors, but resisted in every way it could the creation of this fund.

The Equitable Trust Company and these intervening creditors have been fighting at arms length, each endeavoring to establish a priority over the other. We have been victorious, and the mortgage or deed of trust has been declared void as to us. Our preference must be recognized, and the claim of the losing party postponed. Where the field was open to all he who first secured a priority shall reap the reward of his diligence.

The Equitable Trust Company claimed under this mortgage or deed or trust and defended it against the just claims of the interveners. It has never abandoned its adverse position and is even now insisting in this Court upon a reversal of our decree, occupying as it does this antagonistic position, it seeks to share in the fruits of our recovery. This, in equity, we claim it has no right to do.

Our rights as interveners to the fund in question is superior to that of all other creditors. The rule is stated in 12 Cyc. page 61, as follows:

“The principle is well established that where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly files a creditors’ bill to subject such property of the debtor to the satisfaction of his judgment, he acquires a lien on such property and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors, even though other creditors have judgments obtained prior to the time when the complaining creditor obtained his; and to the fastening or preservation of such a lien no injunction or attachment or levy on the property is necessary.”

The two leading cases in America on this question are the cases of *Edmeston v. Lyde*, 1 Paige Ch. Rep. 636, and *McDermott et al. v. Strong*, 4 John. Ch. R. 687.

In the *Edmeston* case, the Court say:

“And on further examination it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit.”

And again:

“If the creditor whose execution is first returned unsatisfied pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance.”

And in the case of *McDermott v. Strong*, Chancellor Kent said:

“Though it be the favorite policy of this court to distribute assets equally among creditors *pari passu*,

yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court."

The above two cases are cited with approval by the Supreme Court of the United States in the case of Freedman's Savings & Trust Company v. Earle, 110 U. S. 710. In this case the Court say:

"It is to be noted, therefore, that the proceedings is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill. 'The creditor,' says Chancellor Walworth, in *Edmeston v. Lyde*, 1 Paige, Ch. 637-640, 'whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance;' and it would 'seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit.' As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date."

And again, the Court say:

"The passage cited from the opinion in *Day v. Washburn*, *supra*, speaks of the preference thus acquired by the execution creditor as a legal preference. It was distinctly held so to be by Chancellor Kent in *McDermott v. Strong*, 4 Johns. Ch. 687. He there

said: 'But this case stands on stronger ground than if it rested merely on the general jurisdiction of this court, upon residuary trust interests in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired, by means of their executions at law, what this court regards as a legal preference, or lien on the property so placed in trust;' and 'admitting that the plaintiffs had acquired, by their executions at law, a legal preference to the assistance of this court (and none but execution creditors at law are entitled to that assistance), that preference ought not, in justice, to be taken away. Though it be the favorite policy of this court to distribute assets equally among creditors, *pari passu*, yet, whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court.' The decision in that case was made, giving the priority to the execution creditors who filed the bill, when, otherwise, by virtue of an assignment by the debtor who was insolvent, the proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors."

In the case of *Federal Insurance Co. v. Detroit Fire & Marine Company*, Circuit Court of Appeals of the Sixth Circuit, 202 Fed. 648, on page 656, the Court say:

"No distinction is perceived between the principle that should be applied here and that which prevails in equitable proceedings brought to enforce judgments against interests of debtors that cannot be reached by ordinary legal process. If priority is sought in such proceedings, the suit must be limited to that object, and not in terms extended to all creditors of the same class or creditors generally. This principle is applied in a variety of cases. For instance, in *George v. St. Louis Cable & W. Ry. Co* (C. C.) 44 Fed. 122, 123, the late Circuit Judge Thayer, when speaking upon rehearing of a proceeding by judgment creditors



to subject property that could not be effectively reached by execution at law, said:

"I have no doubt that the three complainants by whom the bill in this case was filed might have secured a priority by filing the same for their own benefit; but they did not do so. By the very terms of the bill, they professed to be acting not only for themselves, but "in behalf of, all and singular, the other judgment creditors of the respondent." The effect was to waive the advantage they might have obtained by moving in their own behalf. The result is that the suit, in contemplation of law, has from the beginning been prosecuted by the original complainants in behalf of all judgment creditors who might elect to come in and take advantage of what had been done in their behalf."

"The same principle was recognized by Justice Bradley in *Johnson v. Waters*, 111 U. S. 640, 674; 4 Sup. Ct. 619, 637 (28 L. Ed. 547), and by Justice Matthews in *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 719, 716; 4 Sup. Ct. 226, 229 (28 L. Ed. 301), where he states the rule thus:

"It is to be noted, therefore, that the proceeding is one instituted by the judgment creditor for his own interest alone unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause."

In *Seymour v. McAvoy*, 53 Pac. 946, the Supreme Court of California say:

"A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants. The court therefore did not err in refusing to bring in as parties other judgment creditors who had not themselves commenced any such suit."

In *Reis v. Ravens*, 68 Ill. App. 53, the Court say:

“It is a well established doctrine that a creditor who has by calling to his aid a court of equity and by the exercise of his superior diligence discovered and uncovered property which could not be discovered and seized upon execution at law is entitled to a preference over other creditors.”

In *Gordon v. Lowell*, 21 Me. 251, it was held that where a creditor has, through the instrumentality of a court of equity, sought out and discovered property of his debtor which he had before been unable to discover and seize upon execution at law, he becomes entitled to a preference over other creditors to have his judgment first satisfied even under the insolvent laws.

When a conveyance is void as to creditors, they, or any of them, may in a court of equity have the same set aside. The creditors who first filed his bill obtains thereby a priority and is entitled to be first paid from the proceeds of the sale of the land, if there are no valid prior liens.

*George v. Williamson*, 26 Mo. 190.

*Bank v. Burke*, 4 Blackf. 141.

*Petway v. Hoskin*, 12 Lea. 107.

*Carning v. White*, 2 Paige, 567.

*McDermutt v. Strong*, 4 Johns. Ch. 687.

*Smith v. Lind*, 29, Ill. 24.

*Logan v. Robbins*, 46 Ill. 277.

*Rappleye v. Bank*, 93 Ill. 396.

*Claflin v. Foley*, 22 W. Va. 434.

In *Cole v. Marple*, 98 Ill. 58, the Court in the syllabi say:

“Where a creditor files a bill to subject property or a fund in the hands of a third person to the payment of his debt, he thereby acquires a lien upon such prop-

erty or fund and upon recovery will be entitled to a preference in the satisfaction of his claim to the exclusion of other creditors."

Ballantine v. Beall, 3 Scam. 204.

Alexander v. Tams, 13 Ill. 221.

We particularly call the Court's attention to the case of Clark v. Figgins et al. 5 S. E. 643. The case was decided in the Supreme Court of Appeals of West Virginia. The facts in this case are very similar to the case at bar, and the Court, after reviewing the authorities upon this question at length, say:

"In *Rappleye v. Bank*, 93 Ill. 402, Mr. Justice Sheldon said, in delivering the opinion of the court: 'Although appellant might have proceeded and have avoided the trust deed, and have subjected the estate thereby conveyed to the satisfaction of his judgment, or have had the lots sold on execution, he did not choose to assume that burden or expense. Appellee then assumed the undertaking of avoiding the trust deed, and succeeded in affecting the removal of the incumbrance, encountering all the expense and labor thereof. It is through this proceeding of appellee that this estate conveyed by the trust deed has been secured for application to the satisfaction of these judgments. Appellant now comes forward to appropriate to himself all the benefit. It does not seem just, and we think, under the equitable doctrine which courts apply in analogous cases, and the decision in *Lyon v. Robbins*, 46 Ill. 279, appellee is fairly entitled to a preference, as a reward of its diligence.' Here the three firms to whom the reward of diligence was granted, filed their answers in the court below, and were the only defendants who did so, attacking the said trust deed for fraud. They were fought in this by the plaintiffs in that suit, who were seeking a preference by trying to show the deed was valid. The other defendants contented themselves by standing idly by and seeing these active defendants

carry on the contest at their own labor and expense. When these answers were filed, *quo ad*, these defendants claimed the effect was the same as if they had filed a bill for the purpose of having said trust deed declared fraudulent, and they may be regarded in the nature of cross-bills. At that time there were no prior liens on the property, as all the attachments were subsequently declared void. These three firms were beaten in the court below, and decreed to pay costs with *Dager & Co.*, *Maddux Bros.*, *H. N. Baily*, and *Allemony, Bear & Co.* Three of these parties were applied to by *Ruffner Bros.*, *Arnold Abney*, and *Hurst, Purnell & Co.* to join them in an appeal and declined. None of the others came forward to join in the appeal. These three firms alone applied for the appeal, which was granted, and the decree reversed, and trust deed set aside as fraudulent. It seems to us this cause, in all its circumstances, is within the maxim, *vigilantibus, non dormientibus, jura subveniunt*. There would be no reward to the vigilant if these parties were now compelled to step aside, and let those who fought them persistently all through the cause, in both courts, and those who stood by and did nothing, take the fruits of their labor and expense, or to be compelled to divide it with them."

In regard to the appeal of the American Water Works Company, we contend that no error was committed by the action of the trial court in this matter. The amended petition in intervention of this company which was presented to the trial court did not ask or seek to have the judgment theretofore entered set aside, or in any wise modified; nor in this petition did they take issue with any of the allegations of the bill or intervening petitions. The American Water Works Company, in this petition of intervention, did not question the validity of the trust deed, nor did it set forth the defects therein which were relied upon by the interveners, nor did it ask for any relief



whatsoever against the Equitable Trust Company or any of the interveners. The prayer of their petition, and the only relief asked therein, was that this unsecured creditors' fund of \$45,000 be turned over into the possession of the receiver in order that they might pro rate therein to the extent of about 97 per cent thereof. They did not seek to discover any other assets or to increase in any way by their diligence or efforts the amount of the unsecured creditors' fund. They are in no better position than any of the creditors, as they have assisted in no way in procuring these funds.

We understand that an appeal has been allowed by the receiver in this case. We have not, as yet, had opportunity to see the assignments of error upon which this appeal is predicated, but we are familiar with the record. The answer filed by the receiver by order of the Court does not attack the validity of the mortgage or the trust deed, nor does the receiver in his answer claim that said mortgage or trust deed is void as to him, and as no issue was made upon this question, we can hardly understand how error can be predicated upon a matter which the record discloses was not an issue, and never brought to the attention of the trial court.

In any event, the receiver is in no better position than any of the other creditors. He is no more entitled to the fruits of the labor of the interveners than any one else. Under the authorities which we have heretofore cited in this brief, the rule is uniformly announced that priority in the distribution of the funds is fixed at the time of filing the bill in intervention, and that the receiver's ans-

wer in this case was not filed until after these interveners had filed their petition and raised the question as to the validity of the mortgage. At the time the receiver filed his answer, it is to be presumed that he had knowledge of these defects in the mortgage, but notwithstanding that fact he did not see fit to set forth the same in his answer.

We have no fault to find with the authorities which were cited by counsel for the appellants, but we do claim that none of them are in point in this case.

We desire particularly to impress upon the Court that this is not a case in which the receiver had taken possession of this \$45,000, and was holding the same subject to the orders of the Court to be distributed among the general creditors. This fund, so far as the record shows, would never have come into existence except by the efforts of the intervening creditors. Every creditor will receive as much from the assets of this bankrupt concern as they would have received had the interveners permitted this foreclosure to proceed unassailed by them.

Respectfully submitted,

ALFRED A. FRASER,

*Solicitor for Intervener, aJke M. Shank.*

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**United States  
Circuit Court of Appeals  
For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,

*Appellant,*

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, interveners,

*Appellees.*

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,

*Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913.

*Appellees.*

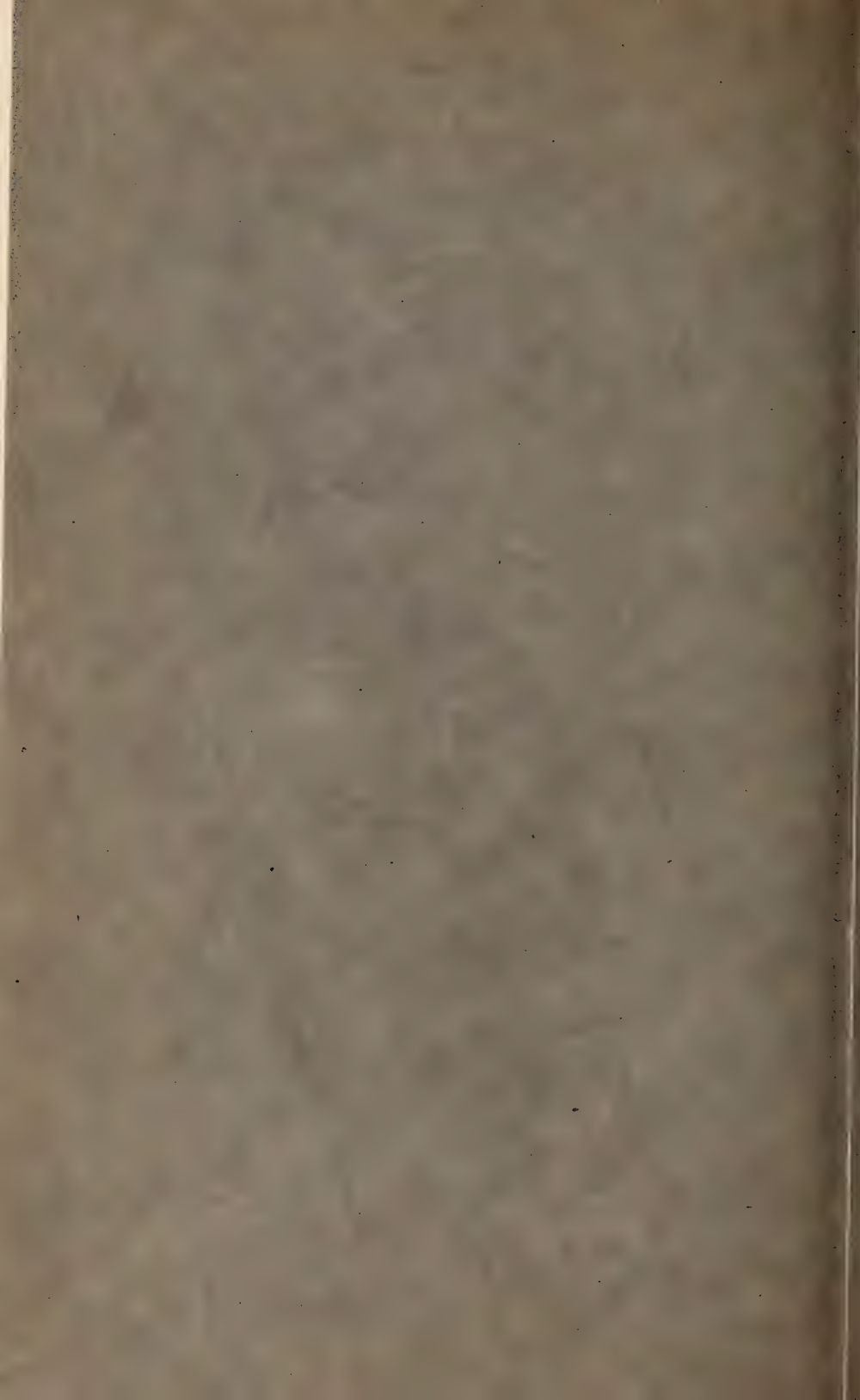
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**BRIEF OF APPELLEES**

**L. M. PLUMER and E. B. SCULL AS EXECUTORS OF THE ESTATE OF L. L. McCLELLAND, DECEASED, IN REPLY TO PETITIONS FOR REHEARING OF BOTH APPELLANTS, THE EQUITABLE TRUST COMPANY OF NEW YORK AND THE AMERICAN WATER WORKS AND ELECTRIC COMPANY.**

*Upon Appeal from the United States District Court for the District of Idaho, Southern Division*

MARTIN & CAMERON, Residence Boise, Idaho,  
Solicitors for L. M. Plumer and E. B. Scull as Executors of the Estate of L. L. McClelland, Deceased.





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**Circuit Court of Appeals**  
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*Appellees.*

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**BRIEF OF APPELLEES**

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The main contentions set forth by appellant, Equitable Trust Company, in its petition for rehearing are substantially as follows :

1. That the creditors who intervened in the mortgage foreclosure suit and successfully attacked the mortgage or deed of trust *as to themselves* insofar as the personal property mort-

gaged was concerned, should not have been allowed to intervene and make this attack for the reason that they held no lien by attachment or otherwise on this personal property.

2. That the \$45,000.00, which the attacking creditors secured for themselves should have been given to the Receiver in the Receivership suit to distribute about 99% thereof to the American Water Works and Electric Company and the other allies of the Equitable Trust Company, who have at all times hindered and obstructed the attacking creditors, and also in order that the Equitable Trust Company may share pro rata in this fund with whatever deficiency judgment it may perhaps obtain at some distant day in the future. The basis for this last contention is their oft repeated, but false statement that the Receiver made the same attack upon the mortgage and deed of trust as did the attacking creditors.

We shall first discuss this second contention of appellant.

The Receiver had the same opportunity as did the attacking creditors to attack the deed of trust as to personal property on the ground that it lacked the affidavit of good faith required by the Idaho Statutes and that it was not filed as a chattel mortgage, but the Receiver refused and neglected to make this attack. The attorneys for these appellees, prior to the time the Receiver answered, begged the Receiver's attorney to join with them in their pleadings and to make this attack for them, but he refused to do so. The Receiver's attorney, however, stated that he felt it was his duty to call the Court's attention to the fact that the records of the debtor company showed that the bonds being sued upon had been issued as collateral only. The Receiver was in default and had no answer on file when the



trial opened. Upon our calling the Court's attention to this fact, the Court directed the Receiver and his attorney to file an answer so that the Court might be advised of the exact issues, if any, which they desired to raise. (Record, pp. 141-142.) The Receiver thereupon filed an answer on the second day of the trial. This answer is found on pages 81 and 82 of the Transcript of Record. If this Court will re-examine this answer, the Court will find that nowhere from beginning to end is the fact mentioned that the deed of trust was not filed as a chattel mortgage and nowhere in the answer is it hinted or mentioned that the mortgage lacked the affidavit of good faith required by Idaho Statutes on chattel mortgages. No hint of these defects is contained in the Receiver's answer. It is in truth strictly "neutral" as to these defects. Moreover, the Receiver in his answer admits either expressly or by failing to deny, all the vital allegations of the bill of complaint with respect to the extent and validity of the mortgage lien. For instance in paragraph Fourth of the Bill of Complaint, found on pages 10 and 11 of the transcript, it is alleged that the mortgagor "*duly made and executed \* \* \* its certain deed of trust \* \* \**". In and by said deed of trust said Great Shoshone and Twin Falls Water Power Company "assigned, transferred and set over" certain classes of property "and all other property, real, personal or mixed," of the debtor company "in trust \* \* for the equal and prorata benefit of all the holders of said bonds and coupons." This allegation is not denied by the Receiver in his answer and therefore stands admitted. The Receiver purposely failed to deny this allegation.

In Paragraph Fifth of the Bill of Complaint, found on pages 11 and 12 of the transcript, the complaint alleges: "Said

Deed of Trust was *duly* recorded in the office of the Recorder, etc." In Paragraph 1 of the Receiver's answer, found on page 81 of the Transcript, the Receiver *expressly* admits all the allegations contained in Paragraph 5 as well as other paragraphs of the Bill of Complaint.

In Paragraph 17 of the Bill of Complaint, found on pages 24 and 25 of the transcript, the complainant points out certain property which had been released from the lien of the mortgage and then alleges that "all other property \* \* \* is subjected to the lien of said Deed of Trust." This allegation is not denied by the Receiver's answer and consequently stands admitted by the Receiver.

These appellees had theretofore denied in the answer which they previously filed all these matters, which are admitted by the Receiver's answer.

For instance in paragraph 4 of our answer on page 111 of the Transcript, we find that "These defendants deny \* \* \* that said Great Shoshone and Twin Falls Water Power Company, *duly* made and executed \* \* \* any deed of trust, etc.," and in paragraph 5 of our answer on page 114 of the transcript, we read that "These defendants deny \* \* \* that said deed of trust was *duly* \* \* \* recorded, etc.," and then in Paragraphs 23, 24, 25, 26 and 27 of our answer found on pages 124 to 129 of the transcript, we point out the special defects in the execution and recording of the deed of trust and supplemental mortgages, allege our inability to attach and in paragraph 27 of our answer, we allege: "That as to all the personal and mixed property of the said Great Shoshone and Twin Falls Water Power Company, the allowed and adjudicated

claim of these defendants is prior and paramount to the claims of complainant or its deed of trust or supplemental mortgages."

No such denials or allegations are made by the Receiver though he had been invited and requested to make such allegations and denials and was fully cognizant of the contents of our answer and might have made such allegations and denials if he had so desired.

We attacking creditors discovered and uncovered these defects in the mortgage and the property whose proceeds resulted in our obtaining this \$45,000.00 fund, and we believe that the prayer of our answer found on page 129 of the transcript is fully justified, being as follows:

"Wherefore these defendants pray \* \* \* \*

2. That the Receiver of said personal and mixed property be required to satisfy the claim of these defendants first, out of said personal and mixed property or the proceeds thereof; and that these defendants, prior to the time of sale, if necessary, on account of the claims of other creditors, be held to have the *equivalent* of a prior lien upon enough of the personal and mixed property of said Great Shoshone and Twin Falls Water Power Company to insure the payment of the claim of these defendants."

When handing down a memorandum opinion, at a time when the matter was of no particular importance, the lower Court inadvertently made the remark: "By intervening creditors and by the Receiver it is urged that as to the personal property which the instrument purports to cover, it is void; or perhaps, speaking more accurately, it is to that extent ineffective as against the claims of other creditors."

It was later called to the Court's attention that the intervening and attacking creditors alone and not the Receiver made this attack on the mortgage, and so the lower Court in denying the petition of the American Water Works and Electric Company to intervene corrected himself in this respect and said: "However that may be upon an examination of the *Receiver's Answer and the proofs*, it will be seen that they were not sufficient to justify the Court in finding or declaring any lien in favor of the petitioner or any other creditors. Proofs of the *existence* and status of claims were offered *only by the intervenors* and only touching *their* claims." Transcript, p. 309.

Again in the same opinion, at pp. 307-308, the Court says: "It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the payment of the bonds, *it never lifted a finger in resistance or suggested that the Receiver do so.*"

Thus again the lower Court recognized the fact that the Receiver had not lifted "a finger in resistance." The trial Court also recognized the fact and so stated that this judgment for the \$45,000.00 was "entirely" the fruit of our diligence. See Transcript, p. 307.

And again, we find the Court saying in the same opinion on page 308: "It is further suggested (by the American Water Works and Electric Company) that the Receiver *might have* asserted for all creditors the rights which the Court recognized in the Intervenor."

From this last quotation, we see that the American Water Works and Electric Company when in the presence of the trial judge, who knew all the facts was only bold enough to "sug-



gest" that the Receiver "might have" made the same attack as the intervening creditors, whereas now in its petition for rehearing it brazenly proclaims "the Receiver made exactly the same defence to the mortgage as did the appellees." See p. 14, Petition for Rehearing of A. W. W. & E. Co. Such tactics on the part of appellants are unfair and calculated only to mislead and deceive this Court. The Receiver as well as the American Water Works and Electric Company stood by and saw us enter into a stipulation that the amount of the fund we were to get was only sufficient to pay our claims without intimating that they intended to make any claim on it.

As to the point that the trustee should participate in this \$45,000.00 fund with a "deficiency," we would again state that even at this late date the trustee has no deficiency judgment. No such request or demand was ever made in the trial Court by the Trustee. The withholding of relief not prayed for surely cannot be reversible error.

Moreover, to allow the trustee to participate with these attacking creditors in this fund would alter the respective relative rights of the trustee and the attacking creditors as they existed at the time of the appointment of a Receiver. Contract creditors could have attached and thus secured a preference over the trustee for the bond holders in this personal property prior to Receivership proceedings. The trustee could not have attached for the reason that its claim was secured by a mortgage on real estate. In order to secure a writ of attachment in Idaho one must make an affidavit that his claim is unsecured. See Sec. 4303, Idaho Rev. Codes. In Idaho there can be but one action for the recovery of any debt or the enforcement of

any right secured by a mortgage, which must be by foreclosure. Sec. 4520, Idaho Revised Codes. In Idaho a mortgagee cannot waive his security and attach and sue upon his debt. Rein vs. Calloway, 6 Ida. 634 at 639. The trustee for the bondholder with a mortgage valid as to real estate and voidable as to personalty did not have an equal chance or right with unsecured contract creditors to be paid out of the proceeds of this personalty prior to receivership proceedings and there is nothing in the receivership proceedings that should give the trustee an advantage over us which he did not prior thereto possess. This is appellants' contention as well as our own. A receivership should not operate to alter the relation of different classes of creditors. For a discussion that touches upon this matter see Westinghouse Elec. & Mfg. Co. vs. Idaho Ry. L. & P. Co., 228 Fed. 972 at 978-979, a case arising in our own District.

In Atlantic Trust Co. vs. Dana, 128 Fed. 209, at 223-224, we find the Court saying:

"The relation of a receiver to intervening creditors like these, is much the same as that of a mortgagee trustee to the bondholders \* \* \* If the creditors, mindful of their interest, are dissatisfied with the manner in which he represents them in suits that are pending, they may under proper circumstances, *intervene*, and ask to be made parties so as to speak for themselves."

This was our situation exactly in the case at bar. The Receiver would make no contest for us against the mortgage grounded on the defects which we pointed out. He would not join in or adopt our pleadings nor would he attack this mortgage because of the defects the attacking creditors pointed out to him. The creation of this \$45,000.00 fund was solely the

result of the diligence and efforts of the attacking creditors, and was so recognized by every one in the Court below. Therefore the attacking creditors should be first paid out of this fund.

“The principle is well established that where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly files a creditor’s bill to subject such property of the debtor to the satisfaction of his judgment, he acquires a lien on such property and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors, even though other creditors have judgments obtained prior to the time when the complaining creditor obtained his; and to the fastening or preservation of such a lien no injunction or attachment or levy on the property is necessary.”

Fairness and equity demand that a similar principle be here applied. See

Clark v. Figgins et al., 5 S. E. 643.

McDermott v. Strong, 4 John Ch. R. 687.

The other main contention made by the appellant, Equitable Trust Company, in its petition for rehearing is that these appellees should not be allowed to intervene and attack the mortgage because they had no lien on the property involved.

Why must we have a lien? The statute does not say we must have a lien, nor does the statute say that a chattel mortgage without an affidavit of good faith is valid as against all creditors, excepting those who have a lien.

It is true that, ordinarily, would-be intervening creditors must show a certain interest in the matters in litigation before

they are allowed to intervene and make a contest in the proceedings pending. Ordinarily, that interest is shown by a lien upon the property which is the direct subject of litigation, but as pointed out in *Potlatch Lumber Co. vs. Runkel*, 16 Idaho 192, at 197, this is a matter of procedure only and does not affect the rights of property and if it is impossible to follow ordinary modes of procedure, this is a sufficient excuse for not following them.

According to *Pittock vs. Pittock*, 15 Idaho 47, at pp. 54-55, the fact that the would-be intervenors distributive share in property would be affected by the outcome of the pending suit, is sufficient to support a petition in intervention.

This court has so correctly interpreted the Idaho decisions dealing with the "interest" necessary to permit intervention and an attack upon a voidable chattel mortgage in Idaho that it would seem unnecessary to add to the Court's opinion.

The Equitable Trust Company in its petition for rehearing discusses the case of *Neustadter Bros. vs. Doust*, 13 Ida. 617, and concludes its discussion on page 22 of its petition with an italicized quotation from the opinion of the Idaho Court in that case reading as follows:

"If the plaintiff conceived that this mortgage was absolutely void or that any part of the property offered for sale by the defendant sheriff was not covered by the mortgage, *he had an ample, plain and speedy remedy at law by attachment.*"

Of course, we did not have the privilege of that remedy in the case at bar because our hands were tied by the Receivership proceedings. Consequently, the foregoing reason has no application in the case at bar. Every opinion must be construed



with reference to the facts that were before the Court for decision.

The appellants do not like the doctrine of the Idaho Supreme Court in *Union Trust etc. Bk. vs. Idaho S. & R. Co.*, 24 Idaho 735. The fact cannot be disputed that the mortgage or trust deed in the *Union Trust Bank case*, *supra*, covered all the property of the corporation real and *personal* (See page 742 of opinion in above case) just as did the deed of trust in the case at bar. By reading the preface of the Court's opinion in the foregoing case setting forth the points raised by respective counsel, it will be seen that practically all the points were raised as are raised by appellants in this case.

As authority supporting our right to intervene see also *Hollins vs. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. ed. 1113.

In *Ruggles vs. Cannedy*, 127 Cal. 290 there was presented a situation very similar to the case at bar and the same argument was made by the losing attorneys in that case as is here made by appellants. On page 292 of that case we find the losing appellant contending "No creditor who has not acquired a specific interest or lien can avoid an unified chattel mortgage."

The California Supreme Court pointed out that there were exceptions to the general rule that a lien is required and said in its opinion beginning at page 299:

- "But it is insisted that, even if an unrecorded mortgage is void at the instance of creditors, only those creditors may take advantage of the law who by judgment and execution levy, or at least by attachment levy, have acquired

a lien upon the property before recordation \* \* \* \* \*

Of course, it is true *in general* that a creditor at large of the mortgagor cannot set aside a mortgage for lack of recordation, any more than can such a creditor set aside a sale void for want of immediate delivery. He must come first with his judgment lien, execution levy, attachment or some other process or right by which he has acquired a specific interest in or claim upon the particular property. \* \* \* \* \*

In this case the creditors had not obtained judgments against the mortgagor, nor indeed had they instituted any proceedings against him at the time he was adjudged an insolvent. After that judgment, by force of the insolvency act itself, they were prevented from resorting to any proceedings in law or equity for such purpose. They were limited to the presentation of claims in the insolvency Court. This they did and when these claims were allowed and approved the questions involved in them became *res adjudicata*. The presentation, allowance and approved of the claim, while not in strictness a judgment, had much of the force and effect of a judgment, and was the only thing in the nature of a judgment which creditors so situated could obtain. For the purpose of enforcing their rights against fraudulent or void acts of the insolvent, it is the *equivalent* of a judgment."

The California Court further held at p. 303 *et seq* that the assignee representing

"these creditors whose claims have been *approved* and *allowed* may institute on *their* behalf an equitable action to avoid the mortgage, an action, which but for the insolvency of the debtor, the creditors themselves unquestionably could have maintained after pressing their debts to judgment."

Appellees do not mention the foregoing case in their petitions for rehearing.

When the obtaining of a lien is rendered impossible by circumstances over which the debtor has no control the necessity

of a lien is dispensed with. Appellants fail to note that our situation brings us within an exception to the general rule. The cases cited by appellant are all correct when applied to the facts of these cases, but have no application in our case, where the reasons for the rule are lacking because of an entirely different state of facts.

In A. & E. Ann. Cases 1912, B Vol. 23, p. 1108, the author states :

“According to many decisions it is not necessary that the creditor shall have a specific lien on the property before he may assail the validity of an unrecorded mortgage.”

The author then cites cases from many different states and to those decisions we respectfully refer this Court.

If the rule contended for by appellees be not adopted it would be possible to have a situation as follows: At the suggestion and with the encouragement of the trustee for the bondholders, a general creditor could bring such a suit as Guy I. Towle brought, and secure the appointment of a receiver, and the property having thus been placed in *custodia leges*, other general creditors would be prevented from acquiring specific lien thereon through the levy of an attachment or execution process, with the result that they would be disabled from attacking an invalid mortgage, while the trustee taking advantage of their disability could rest secure until, upon the maturity of its right to foreclose, it could appropriate the entire property to the discharge of its claim, notwithstanding the defect in the mortgage.

On pages 110-115 of our original brief filed in this Court, we set forth the many reasons why the trial Court was right in refusing to allow the American Water Works and Electric Company to intervene and take from us practically all the results of the contest waged by us. The same reasons apply to the other electric companies that have allied themselves with the Equitable Trust Company. The original opinion of this Court is so clear on this phase of the appeal that we cannot believe that any further argument is desired in this connection. Therefore, we will content ourselves by referring simply to the reasons given in our original brief as above pointed out and to the reasons given by this appellate Court in its opinion.

In conclusion, urging this Court to affirm the judgment of the lower Court, we would say that this appellate Court was entirely correct in its quotation from Judge Dietrich's opinion that the judgment by which this \$45,000 fund was obtained "is entirely the result of their (attacking creditors) diligence," and due in no degree whatever to any efforts put forth by the Receiver. Therefore in equity, the attacking creditors should be first paid out of this fund. And secondly, that though it is ordinarily necessary to have a lien before attacking a chattel mortgage, yet the circumstances of this case bring us within a well recognized exception to the general rule.

Respectfully submitted,

MARTIN & CAMERON,

Residence, Boise, Idaho;

*Solicitors for L. M. Plumer and  
E. B. Scull as Executors of the  
Estate of L. L. McClelland, De-  
ceased.*



# United States Circuit Court of Appeals For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

*Appellant*

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Interveners,

*Appellees*

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Intervener,

*Appellant*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, and WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Defendants, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, Interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

*Appellees*

AMERICAN WATER WORKS AND ELECTRIC COMPANY, the INTER-MOUNTAIN ELECTRIC COMPANY, THE THOUSAND SPRINGS POWER COMPANY and the GUARANTY TRUST COMPANY OF NEW YORK, GENERAL CREDITORS OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY,

*Appellants,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, and Interveners, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, and Complainant, EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

*Appellees.*

## Petition of the Equitable Trust Company of New York for Rehearing.

Upon Appeals from the United States District Court for the District of Idaho, Southern Division

MURRAY, PRENTICE & HOWLAND,

Residence: New York City

RICHARDS & HAGA,

J. L. EBERLE,

Residence: Boise, Idaho.

Solicitors for Petitioner The Equitable Trust Company of New York.

FILED

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F. D. MONCKTON



## United States

## Circuit Court of Appeals

## For the Ninth Circuit

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Intervener,

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*Appellees*

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*Appellants,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, and Interveners, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, and Complainant, EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,

*Appellees.*

**Petition of the Equitable Trust Company of New York for Rehearing.**

*Upon Appeals from the United States District Court for the District of Idaho, Southern Division*

MURRAY, PRENTICE & HOWLAND,  
Residence: New York City.  
RICHARDS & HAGA,  
J. L. EBERLE,

Residence: Boise, Idaho.

*Solicitors for Petitioner The Equitable Trust Company of New York.*





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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**Petition of the Equitable Trust Company of  
New York for Rehearing.**

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To the HONORABLE THE UNITED STATES  
CIRCUIT COURT OF APPEALS, FOR THE  
NINTH CIRCUIT:

Your petitioner, The Equitable Trust Company of New York, appellatant in the above entitled cause, respectfully petitions this Honorable Court to grant a rehearing in said cause. And your petitioner especially claims error in the decision filed herein in the following particulars:

1. The Court has construed Sections 3408 and 4111 of the Idaho Revised Codes so as to authorize general creditors to intervene in mortgage foreclosure suits with the right to contest the validity of a chattel mortgage valid between the parties, whereas the Supreme Court of the State has repeatedly held that a general creditor of a common debtor cannot intervene in a foreclosure suit for such purpose, or any purpose, but that such a contest can only be made by a subsequent purchaser or mortgagee or a creditor who has acquired a lien upon the property by execution, attachment, or some legal process against the specific property involved in the foreclosure suit;



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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**Petition of the Equitable Trust Company of  
New York for Rehearing.**

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To the HONORABLE THE UNITED STATES  
CIRCUIT COURT OF APPEALS, FOR THE  
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Your petitioner, The Equitable Trust Company of New York, appellant in the above entitled cause, respectfully petitions this Honorable Court to grant a rehearing in said cause. And your petitioner especially claims error in the decision filed herein in the following particulars:

1. The Court has construed Sections 3408 and 4111 of the Idaho Revised Codes so as to authorize general creditors to intervene in mortgage foreclosure suits with the right to contest the validity of a chattel mortgage valid between the parties, whereas the Supreme Court of the State has repeatedly held that a general creditor of a common debtor cannot intervene in a foreclosure suit for such purpose, or any purpose, but that such a contest can only be made by a subsequent purchaser or mortgagee or a creditor who has acquired a lien upon the property by execution, attachment, or some legal process against the specific property involved in the foreclosure suit;

and such construction has been given to similar statutes by the Supreme Courts of other States and approved by the Supreme Court of the United States, particularly in *Smith vs. Gale*, 144 U. S. 509, 36 L. Ed. 521.

2. The Court construed Section 3418 of the Idaho Revised Codes as sustaining the rights of the appellees in this cause, whereas that section applies only to foreclosure of chattel mortgages by affidavit delivered by the mortgagee to the sheriff, directing the sale of the property by the sheriff without the institution of a suit by the mortgagee, and it has no application whatever to appellees in this cause; and the decision of this Court in that respect is contrary to both the statutes and the decisions of the highest court of the State of Idaho.

3. The Court seemingly overlooked the fact that the Receiver had been appointed in a general creditors' suit and that he was *not* receiver in the mortgage foreclosure suit, but had possession of the property under his appointment in the general creditors' suit, and was made defendant in the foreclosure suit, to the end that this possession might be decreed subject to the superior rights of the mortgagee under the mortgage lien, and the Receiver could obviously be required to surrender to the Special Master for sale under the decree only such property as was covered by the mortgage lien; the remainder of the property of the solvent debtor would necessarily remain in the possession of the Receiver for the pro rata benefit of all general creditors for whom he was



acting, and no preference right to such general assets not covered by the mortgage could be acquired by any general creditor intervening in the foreclosure suit; for clearly the Court in the foreclosure suit could not reach any property except what was covered by the mortgage; the remainder would remain in the possession of the Receiver, as theretofore, under the order in the general creditor's suit appointing him Receiver for the benefit of all creditors.

4. The Court erred in not passing upon the right of the Receiver to contest the validity of the mortgage as to the property in question on behalf of all creditors, and in apparently overlooking that question in the record, it appearing from the record that the Receiver made the same defense to the validity of the mortgage as did the appellees, whose claims were sustained (Rec. pp. 181-182). And your petitioner, if it is denied a lien on the property as mortgagee, respectfully insists that the Receiver should be awarded the property so that it may be distributed in the general creditors' suit pro rata between all creditors, including your petitioner as the holder of a claim for deficiency.

5. The Court has seemingly overlooked the appeal taken on behalf of a number of general creditors, including the Intermountain Electric Company, the Thousand Springs Power Company, and the Guaranty Trust Company of New York, on behalf of themselves and all other general creditors of said Great Shoshone and Twin Falls Water Power Company, which appeal was allowed by this Court and

is covered by a supplemental transcript of the record. No reference is made to said appeal in the decision, but it is expressly stated in the decision that none of the general creditors, except the American Water Works and Electric Company sought to intervene in the trial court, thus leaving the inference that they were fully protected, whereas the record is undisputed that a majority of the general creditors, including your petitioner on its claim for deficiency, will receive practically nothing on their claims while the appellees, who are also general creditors, will be paid in full.

6. That the decision in this case establishes the impossible rule that general creditors must separately and individually intervene in foreclosure suits, and that a foreclosure suit may thus be converted into a suit not only against the mortgagor and those having any specific claim in or to the property, but also against all general creditors of the mortgagor and claimants to the property.

7. The decision establishes the unprecedented rule that where a receiver has been appointed in a general creditors' suit and an independent suit of foreclosure is afterwards brought, the creditors who have proved their claims in the receivership suit must intervene in the foreclosure suit in order to protect their rights, and that they must at their peril keep informed as to all litigation outside of the general creditors' suit affecting the common debtor, for if they fail to intervene in any suit, even though they have no notice of its pendency, within such time as

the court deems proper, they are forever barred from sharing in the fruits of the litigation.

8. The Court has assumed that the right of intervention in a Federal Suit in Equity is governed by the statutes of the State and not by the Equity Rules and Federal equity practice.

9. Your petitioner should not be deprived of its right to share with the unsecured creditors on its claim for deficiency, and as it is not guilty of any laches, misconduct or failure to assert its rights to the property awarded to the few creditors who intervened in the foreclosure suit, it should be allowed its pro rata share of what is denominated the "Unsecured Creditors' Fund." The fact that it unsuccessfully claimed the property under its mortgage does not bar it from asserting its right as a creditor on an equality with the intervening creditors.

## ARGUMENT

The opinion rendered by this Court shows clearly that the lengthy discussions in the briefs of counsel of subjects having only a collateral or indirect bearing on the questions involved has served simply to confuse the court as to the main issues involved, and the garbled extracts from Idaho decisions in appellees' briefs has seemingly led the court into a construction of the Idaho statutes so clearly contrary to the construction given them by the Supreme Court of the State that we cannot in fairness either to our clients or the Court do otherwise than call the matter to the Court's attention in a petition for rehearing;

and we believe that a re-examination of the record and the Idaho statutes and decisions will show that there is ample grounds for granting a rehearing and finally sustaining the contentions of this appellant.

As the decision now stands, this Court has sustained our contention that the trial court did not correctly apply established principles of equity governing cases of this kind, and that the decision of the trial court, therefore, rested upon principles that were fundamentally unsound. But the court has gone further and beyond the contention of any of the parties, and held that the trial court was wrong in its construction of the State statutes and decisions, thus leading to the unusual situation that this Court has sustained the decree of the trial court though it has held that the trial court was wrong on every point discussed in its opinion and upon which it rested its decision.

The trial court held:

(a) That a general creditor did not under the Idaho statutes have the right (1) to intervene in a foreclosure suit; and (2) to be heard to question the validity of the mortgage, but that in order to so intervene and challenge the validity of the mortgage it was necessary to have a specific interest in or lien upon the mortgaged premises (Record p. 182).

(b) That the appellees, because they had filed their claims in the general creditors' suit and obtained the allowance thereof even though *ex parte* and without notice to other creditors, had acquired an interest in or lien upon this specific property



sufficient to enable them to contest the mortgage and intervene in the foreclosure suit, basing this erroneous conclusion upon the misapplication, if not a misconstruction, of a Federal decision by Judge Taft, a decision of the Supreme Court of the United States, and one of the Supreme Court of California resting upon insolvency statutes and having no application to general creditors' suits (Record pp. 183-184).

Our main contention on this appeal was to show that the court was wrong in its decision on the point stated in paragraph (b) above, as that was the basis of the trial court's decision, and if it was wrong on that point a reversal of its decision, we believed, would necessarily follow. As to that contention, this court has said (p. 10) :

"We readily concede that none of the intervening creditors of the insolvent corporation had or acquired any lien on any of its personal property."

And again, on our contention that there could be no preference between general creditors, this Court said (p. 15) :

"Where he is not appointed for the purpose of impeinding it for a specific purpose, the appointment of a receiver of property by a Federal Court is for the protection and preservation of all rights and interests therein existing at the time of such appointment.

"Authorities to this effect are so numerous that we think it is unnecessary to cite them."

The foregoing propositions having been decided against appellees, the entire basis of the decision of the lower court was removed and a reversal would have necessarily followed, except for the fact that this Court then proceeds further to hold that the trial court was also wrong on the proposition stated in paragraph (a) above, viz., that under the Idaho statutes a general creditor could neither intervene in a foreclosure suit nor challenge the validity of a chattel mortgage, that was valid between the parties, under Section 3408 of the Revised Codes.

It follows from the foregoing that this Court, as stated above, has decided against the trial court on every point upon which its decision rested, and still sustained the decision. While this may occasionally happen, we feel keenly that this Court has misconstrued the Idaho statutes and Idaho decisions, and our contentions are supported by the decision of the learned trial Judge, and because of his long residence and extended experience at the bar in the State of Idaho and his familiarity with its statutes and decisions his views on local law should be entitled to even more than the usual consideration.

As a further general observation on the decision, we are impressed with the fact that the Court must have labored under a misapprehension of the facts disclosed by the record and the supplemental record of certain appellants. We have here two wholly independent suits, one commenced by Guy I. Towle, a general creditor, on behalf of himself and all other general creditors, for the appointment of a Receiver

of all the property, rights and assets of the debtor (Great Shoshone and Twin Falls Water Power Company). A receiver was appointed and he immediately took possession of all the property, including what is involved in this litigation. While the receiver was thus in possession of such property, this appellant commenced a suit to foreclose a mortgage covering, as it believed, all the property in the possession of the Receiver, and it therefore made the Receiver a party defendant in the foreclosure suit. Manifestly, it could not disturb the possession of the receiver except as to property on which it had a lien prior or superior to the claim of the receiver.

In the foreclosure suit the only question that could be involved or determined was the extent of the mortgagee's lien, or the property that would be subject to that lien, and the right of the mortgagee to take from the possession of the receiver and sell under its mortgage would necessarily be limited to the property subject to the mortgage lien. All other property must obviously be left in the possession of the receiver, who held it not by any order or right given him in the foreclosure suit, but under the orders made in the general creditors' suit. The Trial Court, however, allowed the plaintiff in the general creditors' suit and three other creditors, who had *ex parte* obtained the allowance of their claims before any time had been fixed within which creditors might object to each others' claims or submit their claims for final approval, to intervene in the foreclosure suit without notice to other creditors; and

these creditors were in effect awarded, in the foreclosure suit, property in the possession of the receiver in the general creditors' suit and over which the court had held the mortgage did not extend.

We think this is impossible under any theory of sound reasoning or sound law. Clearly there seems to have been a confusion of rights and a confusion of suits, for manifestly what the mortgagee could not take away from the receiver by its mortgage must remain in his possession as receiver in the general creditors' suit, and be held and disposed of by him for the benefit of the creditors for whom he was acting under his order of appointment.

With these general observations, we pass to a consideration of some of the matters discussed in the opinion filed by this Court.

*Right to Intervene in Federal Suits in Equity is Not  
Controlled by State Statutes*

The right of intervention is discussed by the Court with reference to the local law. The Court was seemingly led into this error by the discussion of the subject from this viewpoint by appellees in their brief, and substantially no attention was given to that question by this appellant for the reason that the right to intervene had apparently little or no bearing on the case. Our contention was that under Section 3408 of the Revised Codes no one, whether a party to the suit from the beginning or made so by intervention, could contest the validity of the mortgage, except a purchaser or creditor having a lien



or claim against the specific property involved in the suit. This was based upon the substantive law of mortgages in the State of Idaho, and not upon rules of pleading or general statutes relative to intervention.

*Section 3418 Has No Application to This Suit*

The Court quotes Section 3418, which was urged by appellees in their brief as supporting their contentions, and which reads as follows:

“The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the District Court by any person interested in so doing, for which purpose an injunction may issue if necessary.”

While we shall show later that even under this statute the contest cannot be made except by one who has a specific claim to or lien upon the property involved, the fact remains that this section has not the slightest bearing upon the questions involved, for it relates to another form of foreclosure, viz., the foreclosure of chattel mortgages by affidavit delivered by the mortgagee to the sheriff with instructions to seize the property and sell it without the formality of a suit of foreclosure being brought.

Section 3412 of the Idaho Revised Codes reads as follows:

“Any mortgage of personal property, when the *debt* to secure which the mortgage was given is due, may be foreclosed *by notice and sale as*

*hereinafter provided*, or it may be foreclosed by action in the district court having jurisdiction in the county in which the property is situated." (Our italics.)

This section is followed by Sections 3413, 3414, 3415, 3416, 3417 and 3418, dealing with the sale of property by the sheriff under the first method of foreclosure referred to in the above section. The alternative method of foreclosure by suit in court is not referred to in this title (Civil Code) but is prescribed in the Code of Civil Procedure. And Section 3418 simply permits a creditor having the necessary interest to bring suit to enjoin the sheriff from selling the property under the first method of foreclosure described in Section 3412. For manifestly the parties are entitled to a hearing before the property is sold, but there could be no occasion for an independent action enjoining proceedings in a foreclosure suit; if the parties have any right to the property involved they should intervene in the foreclosure suit.

*Right to Intervene Only Remotely Involved*

The Court next quotes Section 4111 relative to the right of parties to intervene generally in pending suits, but, as stated above, this would seem to have no bearing on this case, for it relates exclusively to matters of pleading by parties in intervention, and in no way modifies the substantive law of mortgages as set forth in Section 3408.

*Construction By Idaho Supreme Court of Statutes  
Involved Here*

The Court cites Union Trust and Savings Bank vs. Idaho Smelting & Refining Company, 24 Ida. 735, as authority for the right of appellees to intervene in the present suit. We think neither the statute nor the decision has any bearing upon the right of intervention in Federal courts of equity; but even assuming that they have, the decision referred to can not possibly help the appellees. In that case Section 3408 of the Revised Codes *was not involved, and was not cited or referred to*, and the creditors who sought to intervene had obtained *judgments* which they alleged were *liens upon the property of the judgment debtor which had been transferred to the Idaho Smelting & Refining Company*, as they claimed, in violation of a constitutional provision prohibiting "the leasing or alienation of any franchise so as to release or relieve the franchise or property held thereunder from any of the liabilities of the lessor or grantor, or lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges." (Sec. 15, Art. II, Idaho Constitution.)

It appeared in that suit that the debtor, the Coeur d'Alene Smelting Company, had suits pending against it when it transferred all its property to the Idaho Smelting & Refining Company, which had an outstanding mortgage or trust deed to the Union Trust & Savings Bank on all of its property, including after-acquired property. Later the pending

suits resulted in judgments against the Coeur d'Alene Smelting Company, and thereafter the Union Trust & Savings Bank commenced a suit to foreclose against the Idaho Smelting & Refining Company, seeking to impress the lien of its mortgage upon the property which the latter had received from the Coeur d'Alene Smelting Company; and the judgment creditors of the Coeur d'Alene Smelting Company sought to intervene and to have their judgment liens impressed on that property ahead of the mortgage lien. They sought also to contest the validity of the mortgage on the ground that the bonds thereunder had been issued in violation of another section of the Idaho Constitution, viz., Section 9 of Article XI, which provides that "No corporation shall issue stocks or bonds, except for labor done, services performed, money or property actually received; and all fictitious increase of stock or indebtedness shall be void."

We think no one would question the right of these judgment creditors to intervene in that suit if they observed the usual rules of pleading; and in any event, the decision, as stated above, does not even purport to construe Section 3408 relative to chattel mortgages as to the interest which a party must have in the property before he can take advantage of the irregularity in the execution or filing of the mortgage.

This Court next refers to the case of Neustadter Bros. vs. Doust, 13 Ida. 617, and says that case "is wholly unlike the present one." And, further,



“We do not understand the case last cited to hold that under the provisions of the Idaho statute that has been cited a chattel mortgage, unaccompanied by the affidavit of good faith and not recorded as required by the State statute, is valid as against all creditors of the mortgagor, except such as have a lien upon the property;”

And further, that there is nothing inconsistent between the case last cited and that of Union Trust & Savings Bank vs. Idaho Smelting & Refining Company, *supra*. Clearly there can be nothing inconsistent between the two cases, for the Union Trust & Savings Bank case dealt solely with the question of pleadings in intervention, while the Neustadter case *did not involve intervention at all*, but was a suit brought under Section 3418 of the Idaho Codes to enjoin a sheriff from selling personal property under the foreclosure of a chattel mortgage by affidavit placed in the hands of the sheriff with instructions to seize and sell the property. The Neustadter case, however, so clearly lays down the interest which a creditor must have in the property covered by mortgage before he can contest the validity of the mortgage, either under Section 3418 or 3408, that it is directly in point in this case and conclusively settles the substantive law of the State in favor of this appellant and against the appellees.

This Court apparently fell into the error of accepting the quotation in appellees' brief from the de-

cision of the Neustadter case and did not notice that it was not even *obiter dictum* but was simply a general criticism of what the complaint did not contain, with some general observations as to what it should have contained. The heart of the decision is found in what was not quoted in appellees' brief, and in what is not quoted in the decision of this Court. After the court had criticized the pleading of the plaintiffs in the injunction suit against the sheriff it went on to show that it would be impossible for plaintiffs under any circumstances to state a cause of action, for the reason that they did not have such interest or lien in or against the specific property foreclosed upon as to entitle them to contest the mortgage.

We especially desire to call the Court's attention to what was really decided in the Neustadter case, and that follows immediately after the quotation in appellees' brief and the quotation set out in the decision. The Court said:

"This action is brought by the plaintiff to restrain the sheriff under the provisions of Section 3396, Revised Statutes, (now Section 3418, Revised Codes), which is as follows: 'The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the district court by any person interested in so doing, for which purpose an injunction may issue if necessary.' It will be noticed from the foregoing section that the right of the mortgagee to foreclose his mortgage and sell the property covered by it, may be contested by

'any person interested in so doing.' The question arises as to whether a general creditor who has no lien upon the property either by contract or by judgment, and who in no way connects himself with an interest in the property by lien or attachment, is an 'interested party' within the meaning of this statute. The courts seem to have quite generally held that such a general creditor is not an interested party. It was held in an opinion by Mr. Justice Field of California, in the case of *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569, that in order for a person to be an 'interested party' so as to entitle him to intervene under a statute which authorized 'interested persons' to intervene, that his interest 'must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit.' The foregoing case seems to have been frequently cited with approval and followed, as will be seen from 1 Cal. Notes, 578.

"In *Howe v. Cochran*, 47 Minn. 403, 50 N. W. 368, the Supreme Court of Minnesota, in considering the right of a general creditor to contest the validity of a chattel mortgage, said: 'The defendants were not in position to question the *bona fides* of the mortgage to the plaintiff. It is only a subsequent purchaser or mort-

gagee or a creditor who has laid hold of the mortgaged property by legal process who on that ground can object that the mortgage is invalid.'

"In *People's Sav. Bank v. Bates*, 120 U. S. 556, 30 L. Ed. 754, 7 Sup. Ct. Rep. 679, a case that was taken up from the State of Michigan to the Supreme Court, it is said: 'A creditor at large cannot attack a chattel mortgage as fraudulent until he has obtained judgment, execution or some legal process against the mortgaged property.' The Supreme Court cites and reviews a number of cases in support of this position.

"In *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35, the supreme court of Washington had under consideration Section 1656 of the Code of that state, which is to the same effect and in part identical with our Section 3396, and held that, before a creditor could be heard to contest the foreclosure, he must show 'an interest in the subject matter.' (*Rockford Watch Co. v. Rump*, 12 Wash. 647, 42 Pac. 213; *Yetzer v. Young*, 3 S. Dak. 263, 52 N. W. 1054; *Fearey v. Cummings*, 41 Mich. 376, 1 N. W. 946; *McCormick Harvesting Machine Co. v. De La Mater*, 114 Iowa, 382, 86 N. W. 365; *Street v. Oliver*, 56 Iowa, 744, 10 N. W. 276; *Treanor v. Bank*, 90 Iowa, 575, 58 N. W. 914.)

"It would seem from the foregoing authori-



ties that even if the plaintiff had otherwise pleaded a good cause of action, he would still not be within the purview of the statute, in that he in no way connects himself with an interest in or claim upon the property about to be sold. When he prosecutes his action, and seeks to enjoin a sheriff from the discharge of his official duty under process delivered him, the plaintiff should be required to state a good cause of action, and connect himself with such an interest as would entitle him to relief before being allowed to proceed further. Such has not been done in this case, and the demurrer was properly sustained. If the plaintiff conceived that this mortgage was absolutely void, or that any part of the property offered for sale by the defendant sheriff was not covered by the mortgage, he had an ample, plain, and speedy remedy at law by attachment. The judgment is affirmed, with costs in favor of respondent."

In view of what is said in the above quotation we do not see how it is possible for this Court to say that the Idaho court in that case held that a general creditor could intervene in a foreclosure suit and contest the mortgage, or that it did not hold anything to the contrary. The conclusion of the court is certainly summed up in the last paragraph, after it has reviewed the authorities, viz.:

*"That even if the plaintiff had otherwise pleaded a good cause of action, he would still*

*not be within the purview of the statute, in that he in no way connects himself with an interest in or claim upon the property about to be sold."*  
(Our italics.)

And further,

*"If the plaintiff conceived that this mortgage was absolutely void, or that any part of the property offered for sale by the defendant sheriff was not covered by the mortgage, he had an ample, plain and speedy remedy at law by attachment."* (Our italics.)

Clearly the Supreme Court held in the above case that a general creditor could not contest a mortgage, and the decision of this court is certainly in direct conflict with the decision of the highest court of the State. The Trial Court so understood the Idaho decisions and statutes, for it did not cite any of these decisions in support of its own decision, but, on the contrary, it attempted to rest its decision upon the erroneous doctrine of general creditors obtaining a lien upon the property through the filing and approval of their claims in the general creditor's suit.

This Court next refers to the case of *Ryan vs. Rogers*, 14 Ida. 309, and *Martin v. Holloway*, 16 Ida. 513, and says that they are not inconsistent with what this Court has said in its decision. Again we think the Court has been misled by the garbled statements and dicta from these decisions quoted in the brief of appellees.

In *Ryan v. Rogers* the Trustee in Bankruptcy brought the suit against the mortgagee and the sheriff and contended that the mortgage was absolutely void. The mortgage covered a stock of merchandise and the mortgagee permitted the mortgagor to remain in possession of the property and to sell and dispose of the goods in the usual course of business without applying the proceeds of sale upon the mortgage debt. The court says, after referring to these facts and decisions relative to such mortgages:

“Notwithstanding these facts, however, the mortgage would be good as to any remaining property covered by it as between the mortgagor and mortgagee, *in the absence of attachment or other lien or encumbrance prior to the mortgagee taking possession.* (Citing cases.)

“In this case the mortgagee took possession of the remaining property covered by the mortgage prior to any *creditors’ rights* initiating by reason of an attachment lien or other encumbrance on the property whereby a general creditor could bring himself within the purview of the statute and acquire a right to contest the mortgage. (*Neustadter Bros. v. Doust*, 13 Ida. 617, 93 Pac. 978.) *Possession of the remaining mortgaged property having been taken by the mortgagee prior to the rights of any creditor attaching thereto, the mortgagee would be exempt from the application of the general rule.*” (Our italics.)

Clearly the court held and decided in that case that the right of a creditor to question a mortgage could not be initiated except by the acquisition of some lien. If a general creditor could make the contest, why have the courts invariably determined the relative rights of the parties with reference to the date of possession by the mortgagee and the date of the attachment or levy under execution by the creditor? Manifestly, these courts have all been wrong if this Court is correct in its construction of the Idaho statutes, for it has always been held that where the mortgage was irregular and was subject to contest the mortgagee could protect himself by obtaining possession of the mortgaged property before the creditors acquired some lien by *attachment or levy*.

We agree with the court that there is nothing inconsistent between the decisions in *Neustadter Bros. vs. Doust* and *Ryan vs. Rogers*, but neither decision has anything in common with *Union Trust & Savings Bank vs. Idaho Smelting & Refining Company*.

In *Martin vs. Holloway*, 16 Ida. 513, 529, the court quotes with approval the foregoing from *Ryan vs. Rogers*, and adds:

"In that case this court held that while it would, as a matter of law, be a fraud upon attaching creditors, and avoid the mortgage where the mortgagor was permitted to remain in possession of the stock of merchandise, where the stock was double the value of the debt, and continue to sell such stock in the ordinary course of trade long after the debt matured, *still where*



*the possession of such property was surrendered to the mortgagee prior to the date attaching creditors' rights attached, the possession of the mortgagee would be exempt from the application of the general rule."* (Our italics.)

The court then reviews the authorities on the right of the mortgagee to take possession and thereby make his mortgage good when it would otherwise have been subject to contest, and then adds:

"We believe the rule announced in this case is correct, and that where a chattel mortgage is valid between the parties, even though for some reason it be void as to creditors, yet if the property be delivered to the mortgagee prior to the time any *specific right or lien* upon the property is acquired by a creditor, the possession of such mortgagee is valid, and may be maintained and the property sold under the provisions of such mortgage. \* \* \* A general creditor has no more right to the property than the mortgagee, even though the mortgage be void as to creditors. Either may procure a lien upon such property in any method known to the law, and if a mortgagee takes possession of the mortgaged property, even under a mortgage void as to creditors, his possession cures such defect and gives him the right to maintain such possession as security for his debt, and if this is done with the consent of the mortgagor *prior to the time the general creditor secures an*

*attachment, the mortgagee's right becomes prior to that of the attaching creditor."* (Our italics.)

We submit that the Idaho decisions must be construed as holding that the right of a creditor to contest a mortgage arises when he obtains a lien by attachment or levy upon the property, and not before. That was the construction placed upon these decisions by the learned trial Judge, and we think it is settled law not only in the State of Idaho but in practically every jurisdiction where the substantive law as to mortgages is substantially as it is in this State. Some of the courts have considered it solely from the standpoint of the general right to intervene in litigation, and others have based it upon the mortgage statutes similar to Section 3408 of the Idaho Codes.

The leading case on the subject is *Horn vs. Volcano Water Co.*, 13 Cal. 62. This has been cited and approved in nearly all the western States, by this Court, and by the Supreme Court of the United States in *Smith v. Gale*, 144 U. S. 509.

*Horn vs. Volcano Water Co.*, *supra*, was first approved by the Idaho Supreme Court in 1869 in *People vs. Green*, 1 Ida. 235. In that case the Idaho Supreme Court in discussing the right to intervene, said:

"The right to intervene has been taken from the Code of Louisiana, and adopted into our practice. It is not every kind of interest which

will entitle a party to intervene. *The true rule is laid down by Chief Justice Field in Horn vs. Volcano Water Co., 13 Cal. 62.*" (Our italics.)

A rather full review of the authorities will be found in *First National Bank of Las Vegas v. Clark* (N. M.) 153 Pac. 169.

The Supreme Court of South Dakota, in *Yetzer vs. Young*, 3 S. D. 263, 52 N. W. 1054, a case frequently cited by other courts, had before it *a case where a general creditor sought to intervene in a foreclosure suit*. The court said:

"The first question presented is as to the qualifications of an intervener. Our statute respecting intervention, when and how it may take place, is the same as that of California, and practically like that of Minnesota and Iowa. Any person may intervene 'who has an interest in the matter in litigation,—in the success of either party.' Appellant contends that as a simple judgment creditor she had such 'an interest in the matter in litigation' as entitled her to intervene, the argument being that the object of plaintiffs' action was to get possession of the goods, to appropriate them to the payment of their alleged mortgage, and thus reduce and divert the fund out of which she might otherwise collect her judgment, and that she was directly interested in preventing this. The subject matter of the litigation was plaintiffs' right to take the goods under their mortgage.

It went only to the possession. In this question appellant could not be concerned, unless she had some interest in the goods that might be affected by such change of possession. We do not think appellant's interest as a general judgment creditor, either in the matter in litigation or in the goods, was sufficiently direct or immediate to entitle her to intervene. Upon this point the case of *Horn v. Water Co.*, 13 Cal. 62, is instructive. \* \* \*

"The 'matter in litigation' in the original action in which appellant sought to intervene was plaintiffs' right to the possession of the goods under their mortgage. In such an action appellant could not intervene without showing that she had some interest in or relation to the property upon which the law could recognize her right to appear for and protect it from going even temporarily into the wrongful possession of another. In this respect there is an analogy between the qualifications of an intervenor and one entitled to attack a conveyance as fraudulent. A general creditor, either contract or judgment, may not do it. He must first become interested in the particular property he desires to reach, by attaching his claim to it. In case of real estate, this may be done in this state by docketing a judgment in the proper county, or, in case of personal property, by levying an execution or attachment. The property involved in this case was personal



property, and we do not think that appellant, as a judgment creditor merely, was entitled to intervene."

We think it is unnecessary to extend the discussion on this subject. We cannot see that there is any room for contention that the Idaho Supreme Court decisions and Section 3408 should not be construed as we contend they should be, and it was for that reason the Trial Court based its decision upon other grounds which, as this Court has expressly held, were unwarranted and untenable and cannot be sustained under the accepted rules governing general creditors' suits. Certainly there is nothing about this case that calls for the application of a new doctrine that is subversive of the settled law of the State.

*Your Petitioner on its Claim for Deficiency is Entitled to Share in Proceeds from Property Not Covered by Mortgage.*

In the event it should finally be held that your petitioner's mortgage was subject to contest by appellees, and that it did not cover the property which was sold and the proceeds from which constitute what is known as the "Unsecured Creditors' Fund," then your petitioner respectfully insists that it is entitled to share, with appellees on its claim for deficiency, pro rata the proceeds in that fund, for clearly your petitioner cannot be charged with laches for failure to intervene in the foreclosure suit, and it has not been guilty of any conduct that would empower the court to forfeit (if that were under any

circumstances possible) its right to share in that fund.

Your petitioner in good faith claimed all the property under its mortgage, and it has sought to establish the lien of its mortgage against all the property, but should it fail to do so there can be no authority for penalizing it and placing it in the class with the creditors who did not appear in the foreclosure suit. Certainly, as a general creditor, it is entitled to share with Towle, Hahn, Shank and the executors of the McClelland Estate. We can conceive of no theory upon which, if the general creditors are divided into classes, your petitioner should not be placed in the class with those who intervened in the foreclosure suit, for surely your petitioner has not been guilty of laches in pressing its claim, and it has done nothing that can justify a discrimination between it and the intervening creditors. The fact that it laid claim to all cannot deprive it of its proportionate part.

Your petitioner, however, while claiming the right to share with the intervening creditors in the unsecured creditors' fund, in the event all the general creditors are not entitled to share in such fund, does not concede the right of the Court to distinguish between the intervening creditors and the other general creditors who have filed their claims in the receivership suit and relied upon the receiver and the court to protect their rights and assemble the assets of the insolvent debtor. And we shall next consider those parts of the decision which give a preference to the intervening creditors over other creditors.

*Intervening Creditors Not Entitled to Preference*

This court says in its opinion (p. 15) :

“The receiver in the present suit therefore held all of the personal property of the insolvent corporation to which the trustee’s lien did not apply, for the benefit of the complainant in the receivership suit and for such of the general creditors of the insolvent debtor as should join therein. So far as appears all such general creditors did so join except the appellant American Water Works and Electric Company.”

The Court is certainly mistaken as to the facts shown by the record. All the creditors had filed their claims in the Receivership suit, but only four of them came into the foreclosure suit. The Receivership suit had not been consolidated with the mortgage foreclosure suit and there had been no extension of the Receivership proceedings over the foreclosure suit or for the benefit of the mortgagee. The Receiver was acting exclusively under his appointment in the general creditors’ suit, and none of the general creditors had been made parties to the foreclosure suit, except Guy I. Towle, and Carl J. Hahn. The latter had a judgment which it was believed was a lien on some of the real property covered by the mortgage. So far as the record shows, none of the other general creditors had any knowledge whatever of the foreclosure suit, although it seems to have been well understood among the creditors that all the assets of the corporations were subject to a large

mortgage. The status of the proceedings and the attitude of the creditors is well stated in the brief of appellees on behalf of the intervening creditors, as follows, (p. 42) :

“But four creditors from the general creditors’ suit sought an opportunity at the last moment, after the receiver had failed and neglected to represent them, to intervene in the foreclosure suit, an entirely different and distinct suit, and wrest from the mortgagee certain property which otherwise would have gone to the mortgagee, not to the general creditors in the receivership suit.”

And again, (pp. 92-96) :

“No receiver was appointed in the case at bar. The receiver was appointed in an altogether different suit, started six months prior to the commencement of the foreclosure suit. \* \* Many creditors filed their claims in the receivership suit. The creditors merely allowed their claims to lie on file in the receivership suit. This condition existed for several months in the receivership suit. For several months the creditors in the receivership suit did not even take the trouble to prove their claims in the receivership suit, as they supposed that the lien of the deed of trust of the Equitable Trust Company would take all of the assets of the insolvent debtor, and it was supposed that the creditors in the receivership suit, except the secured creditor, the Equitable Trust Company of New York, would



get only two or three per cent. on their claims and possibly nothing whatever. \* \* \*

“At the time this foreclosure case was brought, and practically down to the date of the trial of this foreclosure case, it was supposed by all the creditors that the Equitable Trust Company of New York could take all of the property of the insolvent debtor to satisfy its deed of trust. So general was this supposition among the creditors in the receivership suit that the creditors in the receivership suit did not even take the trouble to prove their claims in the receivership suit.”

Now note—Is their conduct open, fair and frank, and consistent with the theory of the general creditors' suit in which these same parties had sought protection, and secured the approval and allowance of their claims?

Continuing they say:

“Then, just a few days before the trial in the foreclosure suit, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, upon an examination of the bill of complaint, discovered to their agreeable surprise, what no other creditor had found, that there was a defect in the deed of trust and one of the supplemental mortgages, then being foreclosed in this foreclosure suit, to-wit: that the deed of trust and supplemental mortgage though covering personal property which was not a constituent part of a public service corporation's

plant and not necessary for the maintenance, operation and repair of the said plant, had not been executed with the formalities required by the statutes of the State of Idaho. \* \* \*

“Thereupon this claimant immediately called this discovery to the attention of the other *three claimants*, the Towle claim, the Hahn claim and the Shank claim. \* \* \* Immediately the McClelland claim was proved in the receivership case, and the three other claimants proved their claims in the receivership case, having first notified the receiver. (It should be noted that no notice had ever been given the creditors to make proof of claims or to object within any fixed date to the claims of other creditors, and the approval of these four claims was *ex parte* with notice only to the receiver.) \* \* \* The claims were duly allowed and approved by the court. \* \* \*

“The court thereupon allowed the claimant to intervene in the foreclosure suit. The procedure upon the Shank claim was practically the same. These interveners did not delay the trial but filed their answers immediately.

“The parties immediately proceeded to trial in the foreclosure suit \* \* \* These *four* claimants were the only creditors that had been diligent enough to prove their claims in the receivership suit, were the only creditors that attempted to assert their rights in the foreclosure suit. \* \* \*

It should be noted that these intervening creditors made the "discovery" on the eve of the trial of the foreclosure suit; that they did not communicate their information to any of the other creditors or to the receiver; that they did not request the receiver to make a claim to the property on behalf of all the creditors; that they did not seek to intervene and make the contest in the foreclosure suit on behalf of all the creditors in harmony with the theory of the general creditors' suit, which Towle had previously brought, and in which they had all filed their claims and sought relief; but they intervened in the foreclosure suit solely for the purpose of obtaining an advantage for themselves and over the other creditors. It should be noted also that not until December 24th following did the Court fix a date when the creditors should make proof of their claims and file objections to each other's claims, and it then fixed February 14th, 1916 (Rec. p. 346.)

We have found no precedent for relief being extended by courts of equity in such cases. The intervening creditors and all other creditors were represented by the receiver, and whatever contest was necessary should be made by the receiver on behalf of all the creditors. In this case the contest was made by the receiver as well as by these intervening creditors (Record, bottom of page 181 and top of page 182). But the trial court held that while the intervening general creditors could attack the mortgage the receiver, who represented all the creditors could not attack it, or, in any event, it awarded the

proceeds of the property to the intervening creditors and not to the receiver.

In our original brief (pp. 19-20, 25, et seq.) and in our reply brief the authorities on this phase of the litigation are cited and quoted from at length, and we shall not extend the discussion here. But we earnestly insist that there is no precedent for such discrimination between creditors and no authorities supporting it have been cited either by this Court or the trial Court, and we confidently assert that none can be found; for such action seems totally inconsistent with both law and equity, and we can conceive of no reason why the conduct of the intervening creditors in concealing their information from the other creditors and making the contest solely on their own behalf should so strongly appeal to any court as to establish a precedent here that cannot be followed in other cases and must soon be overruled by this Court.

If the Receiver or his counsel were unwilling to make a proper contest, which certainly is not the case here, the court could have appointed other counsel or allowed one or more of the creditors, at the expense of the receivership estate, to make the contest by their own counsel for the benefit of all creditors. Manifestly when the claim of the mortgagee to take the property was decided adversely to it, the property remained as theretofore in the possession of the receiver in the general creditors' suit. And neither this Court nor the trial Court has shown how or by what authority the court in the foreclosure suit could reach over into the general creditors' suit and



take from the receiver in that suit property not covered by the mortgage and sell it in the mortgage foreclosure suit for the benefit of a few general creditors whose claims had been filed in the Receivership suit.

We submit, therefore, that if any of the defendants or parties to this litigation could contest the mortgage it must be the receiver for and on behalf of all creditors, and not a few general creditors who "slipped by night," as it were, out of the general creditors' suit into the foreclosure suit on the eve of the trial and seized property of the common debtor to which they previously had no greater right than other general creditors, and which was at the time in the possession of the receiver, appointed at their instance and in their behalf.

There are seemingly other errors in the opinion in the statement of the facts, but as they relate largely to the intervention of the American Water Works and Electric Company and to matters that properly concern the Intermountain Electric Company, the Thousand Springs Power Company and the Guaranty Trust Company of New York, whose appeal appears to have been entirely overlooked by the court, we shall not discuss the matter here.

In conclusion, we most earnestly insist that the decision of this court is in conflict with the decisions of the Supreme Court of the State of Idaho on the construction of local statutes; that the facts were seemingly not made clear to the court and the statement thereof in the opinion seems unfair to the Court and prejudicial to the parties; that the decision ap-

parently rests on principles not heretofore sanctioned by courts of equity in the administration of assets of insolvent debtors in general creditors' suits; that the reasons for granting a rehearing and considering further the facts and the questions of law and equity involved far outweigh anything that can be urged against changing the decision.

Respectfully submitted,

JAMES H. RICHARDS,

OLIVER O. HAGA,

J. L. EBERLE,

*Solicitors for Petitioner, The Equitable Trust Company of New York.*

STATE OF IDAHO, }  
County of Ada. } ss.

I, OLIVER O. HAGA, of counsel for petitioner above named, do hereby certify that in my judgment the foregoing petition is well founded, and that it is not interposed for delay.

Dated November 17, 1917.

OLIVER O. HAGA,

*Solicitor and of Counsel for Petitioner.*

No. 2791

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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

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THE EQUITABLE TRUST COMPANY OF NEW  
YORK, as Sole Trustee, et al.

vs.

GREAT SHOSHONE AND TWIN FALLS  
WATER POWER COMPANY, a Corporation,  
WILLIAM T. WALLACE, as Receiver of GREAT  
SHOSHONE AND TWIN FALLS WATER  
POWER COMPANY, et al.

*Appellants,*

GUY I. TOWLE, CARL J. HAHN, as Administra-  
tor of the Estate of HARRY M. KING, Deceased,  
et al.

vs.

AMERICAN WATER WORKS AND ELECTRI-  
CAL COMPANY, et al.

*Appellees.*

*(See following two pages for full title.)*

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**Petition of the American Water Works and Electric  
Company, The Inter-Mountain Electric Com-  
pany, the Thousand Springs Power Company  
and Guaranty Trust Company of New York  
for Rehearing.**

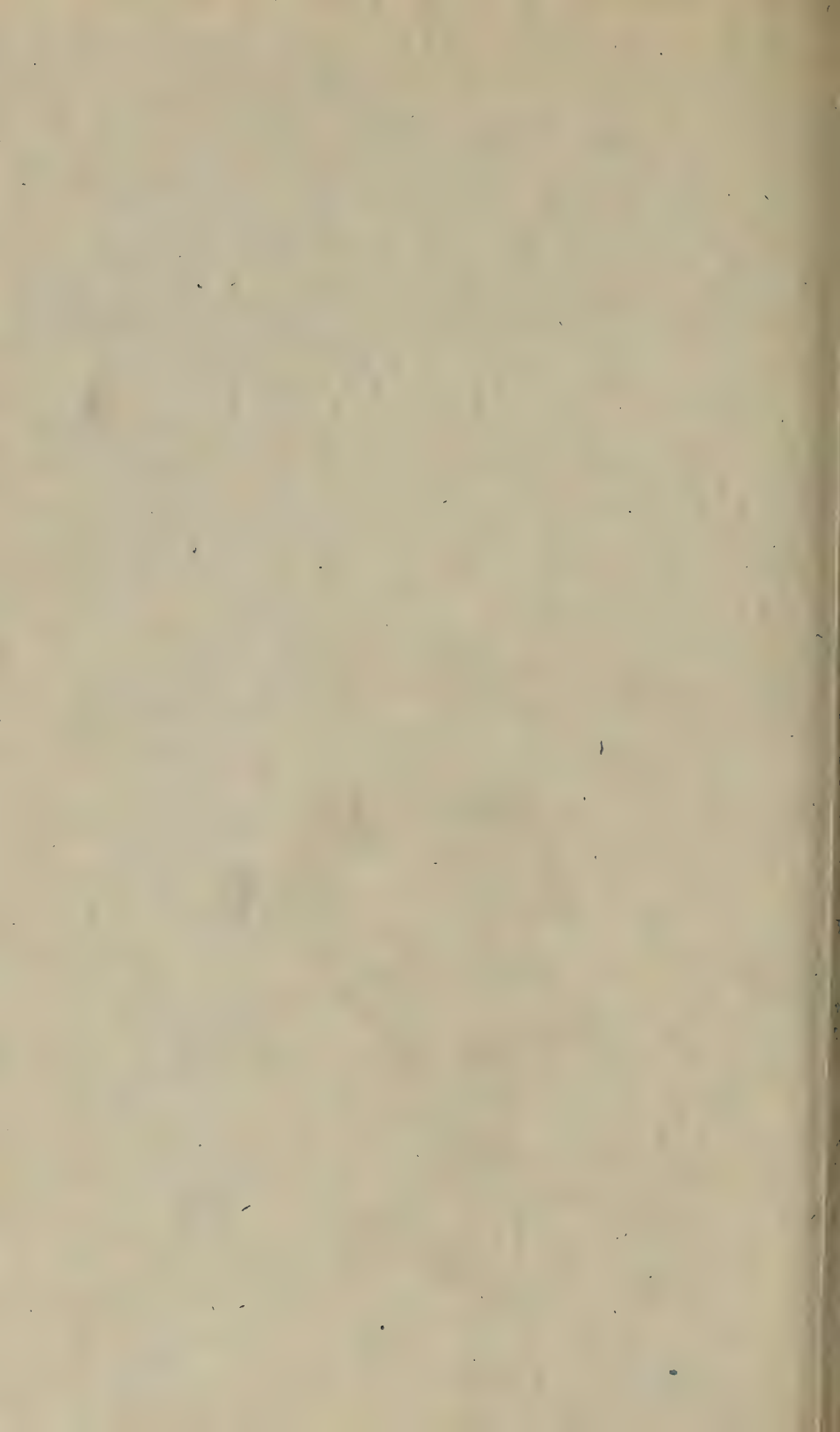
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*Upon Appeals From the United States District  
Court for the District of Idaho,  
Southern Division.*

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WYMAN & WYMAN,  
*Solicitors for American Water Works and Electric  
Company, Intermountain Electric Company, The  
Thousand Springs Power Company, and Guaranty  
Trust Company of New York.*

FILED  
JUN 20 1917  
F. D. MONTGOMERY  
CLERK





No. 2791

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913.

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, Defendants, and L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Interveners.

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a Corporation, Intervener,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, and WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Defendants, L. M. PLUMER, and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, Interveners, and THE EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by the GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913.

AMERICAN WATER WORKS AND ELECTRICAL COMPANY, the INTER-MOUNTAIN ELECTRIC COMPANY, THE THOUSAND SPRINGS POWER COMPANY and the GUARANTY TRUST COMPANY OF NEW YORK, GENERAL CREDITORS OF GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY,

Appellants,

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of HARRY M. KING, Deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a Corporation, WILLIAM T. WALLACE, as Receiver of GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, and Interveners, L. M. PLUMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, Deceased, and JAKE M. SHANK, and Complainant, EQUITABLE TRUST COMPANY OF NEW YORK, as Sole Trustee Under a Deed of Trust Made by Great Shoshone and Twin Falls Water Power Company, Dated May 1, 1910, and Supplemental Mortgages Dated June 21, 1911, and April 7, 1913,  
Appellees.

---

**Petition of the American Water Works and Electric Company, The Inter-Mountain Electric Company, the Thousand Springs Power Company and Guaranty Trust Company of New York for Rehearing.**

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*Upon Appeals From the United States District Court for the District of Idaho, Southern Division.*

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*To the Honorable the United States Circuit Court of Appeals for the Ninth Circuit.*

Your Petitioners, American Water Works and Electric Company, Intermountain Electric Company, The Thousand Springs Power Company, and Guaranty Trust Company of New York, appellants in this cause, do respectfully petition the Honorable Court to grant a re-hearing herein; and in support of their petition they show that error was committed in the decision filed in this cause as follows:

1. That in the consideration of this appeal the

Court has believed its decision should in some wise be affected by the question of laches on the part of the American Water Works and Electric Company, while such matter ought not to have been so considered and for the further reason that the American Water Works and Electric Company was not in fact guilty of laches.

2. That the Court has erred in not considering the appeal allowed these petitioners by this Court and in not passing upon the right of the Receiver to contest the validity of the mortgage herein as presented by that appeal; and in not awarding to the Receiver the fund or property in question that it may be ratably distributed to all creditors of the insolvent corporation.

3. That the Court has not given due effect to the fact that the property in question was in the possession of a Receiver appointed in a general creditors' suit and that such Receiver was made a party to a foreclosure suit affecting the property so in his possession for the purpose of determining to what extent his possession should yield to the superior claim of such mortgagee; for upon consideration of these matters it would seem certain that the property not so taken from him by the superior claim of the mortgagee should have been continued in his possession for the benefit of those for whom he held.

4. That the Court has not given due weight to the fact the Special Claimants here had no title to, claim upon or right to the possession of the property

in question, while the Receiver had both such claim and right; and yet the property was taken away from the Receiver and given to the Special Claimants.

5. That the Court by its decision seems to give countenance to the mistaken view that after the appointment of a Receiver in a general creditors' suit, general creditors who have joined therein may by judicial proceedings better their position to the disadvantage of other creditors.

### ARGUMENT.

The record upon this appeal, though not particularly long, is nevertheless somewhat confusing and we think the Court has not understood the facts of the case. We therefore undertake to present here a brief and succinct statement of them, believing that thereby the true relationship of the parties as among themselves and to the fund in question will appear quite differently from what the Court has assumed them to be.

The Equitable Trust Company had a mortgage upon all the property of the Great Shoshone and Twin Falls Water Power Company, both real and personal. That mortgage, though in proper form as a mortgage of realty, did not meet in certain respects the requirements of the statutes of Idaho with respect to personal property.

In these circumstances, the Great Shoshone



Company became insolvent and Towle brought a general creditors' suit against it; a Receiver was appointed who took possession of all its property, including the personal property involved here, for the benefit of such creditors of the insolvent corporation as might thereafter join in that proceeding. Notice to creditors was given by the Receiver under the direction of the Court and many creditors, including these petitioners, filed their claims in accordance with that notice. None of the claims so filed were formally allowed until and except as hereinafter shown.

During the progress of the receivership, the Equitable Trust Company commenced its suit to foreclose its mortgage upon all the property of the Great Shoshone Company, which property was in the hands of the Receiver. Proper parties were made defendant to that suit, including the Receiver, who was made a party because, and only because, he was in possession of the property and it was necessary to determine, so far as he was concerned, as to what part of such property he might properly be required to surrender the possession. The receivership in the Towle suit was not extended over the foreclosure suit nor were the two actions consolidated, nor was the mortgage foreclosed in the general creditors' suit as sometimes is done. It is important, we think, to keep in mind the fact that these suits were wholly distinct judicial proceedings.

The foreclosure suit was then brought on for hear-

ing. We cannot better state the situation at this point than to quote from the appellees' brief:

"At the time this foreclosure case was brought, and practically down to the date of this trial of this foreclosure case, it was supposed by all the creditors that the Equitable Trust Company of New York could take all of the property of the insolvent debtor to satisfy its deed of trust. So general was this supposition among the creditors in the receivership suit that the creditors in the receivership suit had not even taken the trouble to prove their claims in the receivership suit.

"Then, just a few days before the trial in the foreclosure suit, L. M. Plumer and E. B. Scull, as executors of the estate of L. L. McClelland, deceased, from an examination of the bill of complaint, discovered to their agreeable surprise, what no other creditor had found, that there was a defect in the deed of trust and one of the supplemental mortgages, then being foreclosed in this foreclosure suit, to-wit, that the deed of trust and supplemental mortgage though covering personal property which was not a constituent part of a public service corporation's plant and not necessary for the maintenance, operation and repair of said plant, had not been executed with the formalities required by the statutes of the State of Idaho, in which said personal property was situated, in that it did not have the affidavit at the end thereof to the effect that such deed of trust and supplemental mortgage had been given in good faith and without intent to hinder, delay and defraud creditors, and furthermore said instruments had not been filed for record as such instruments covering chattels in the State of Idaho are required by the statutes of Idaho to be filed.

"Thereupon, this claimant immediately called

this discovery to the attention of the other three claimants, the Towle claim, the Hahn claim, and the Shank claim, and upon examination of the pleadings in the foreclosure case found that the Receiver had not set up such defenses on behalf of the creditors and found that the Receiver was in default and had put in no answer whatever. Immediately the McClelland claim was proved in the receivership case, and the three other claimants proved their claims in the receivership case, having first notified the Receiver. These claims were taken up in court, the Receiver and his counsel being present, at the time and place pursuant to due and proper notice and three of the claims were duly allowed and approved by the Court upon the showing then and there made, in the receivership case. Prior to the commencement of the receivership case, the Hahn claim had been reduced to judgment. Immediately after proving their claims, the McClelland claim and the Shank claim petitioned for leave to intervene in the foreclosure suit for the purpose of assailing the lien of the deed of trust and supplemental mortgage \*

\* \*

"The Court thereupon allowed the claimant to intervene in the foreclosure suit (the case at bar). The procedure upon the Shank claim was practically the same. These interveners did not delay the trial but filed their answers immediately. As to the Hahn claim and the Towle claim no petition for leave to intervene in the foreclosure suit was necessary because the Equitable Trust Company of New York had made them parties when it filed its bill in the foreclosure suit (the case at bar).

"The parties immediately proceeded to trial in the foreclosure suit. The trial took place in the latter part of October. The Court thereafter rendered its decision (Record, p. 177) in



the foreclosure suit, giving to the four claimants a prior claim over and above the lien of the deed of trust upon the personal property above described, and ordered that it be sold separately."

It is important to consider, too, that the Receiver had filed an answer in the case in which he specifically asked that only so much of the property in his hands be sold as was covered by the lien of the mortgage. Even if the Receiver's answer were not as full as it might be, it is certain that upon the trial it was conceded to be sufficient to raise the same defence as that raised by the special claimants, for as Judge Dietrich has said in his opinion:

"By the intervening creditors and by the receiver, it is urged that as to the personal property which the instrument purports to cover, it is void." (tr. pp. 181-2).

It is true creditors other than the special claimants did not intervene or defend in the foreclosure suit, but it is equally true that the Receiver himself did appear and make the defence for them.

If it be asked why the other creditors did not themselves intervene, the sufficient answer would seem to be found in the quotation already given from Appellees' Brief—they did not know that any such defence was available, nor did anyone discover the fact until immediately prior to the trial. But had all creditors intervened, would the defence have been presented any more effectively than it was?

It is, we think, to put emphasis upon an unimport-



ant circumstance to consider the rights of these petitioners as in anywise affected by the matter of diligence. We have here no race as among creditors to see which may first acquire a lien upon the property. The creditors' suit had put an end to the right of any creditor to obtain a preference by judicial proceeding or otherwise, and the Court has held that the appellees had not obtained any special property right or interest in the property. The Receiver was in possession for the benefit of all and was charged with the duty of protecting the trust. It ought not to be true, that in these circumstances, it was the duty of a creditor who had joined in the creditor's suit by filing its claim, to watch, not the Receiver, but other creditors who had similarly filed their claims, with the view of preventing their obtaining a special advantage in the distribution of the trust fund.

Such being the facts, we think it wholly unnecessary to go into the matter of showing the diligence on the part of the American Water Works and Electric Company in seeking to intervene. It is enough to show that any delay was in nowise through its fault. It tried in every manner possible to it to have its claim approved and its petition to intervene allowed. It is not claimed that the short delay resulting in large measure from the absence of the District Judge from the District injured the appellees or caused them to change their position with respect to the property or fund.

We are not taking the position upon this appeal that the special claimants under the permission of the Court, might not intervene. Indeed, the right to intervene might in some circumstances become exceedingly important, as where the Receiver was not a party to the proceedings or was not properly defending. But what we do contend is, that where such intervention is allowed on the part of a few of the general creditors who had proved their claims in the general creditors' suit, they cannot thereby acquire any special rights or preference over other creditors.

Whatever may have been the prayers of their interventions (and it is not likely they or others similarly situated will not pray for enough), the only relief that they were entitled to was such as might result from the defeating of the lien of the mortgagee upon the mortgaged property. In other words, it is our claim that, having no special interest in the property, and your Honors decide that they have none, all that they might properly have as the result of the defence they and the Receiver jointly urged was that the mortgage should be foreclosed as to part of the property only and that the Receiver might not be dispossessed of such of it as was not covered by the lien of the mortgage. On what ground was the Receiver's prayer denied? When and where did these special claimants acquire an interest in the property adverse to him? And yet without any such interest, by the decree below, not only is the

Equitable Trust Company denied its lien, but the property is taken from the possession of the Receiver himself and given (in effect) wholly and exclusively to certain general creditors of the mortgagee.

In view of the fact the opinion does not refer to the appeals by other claimants than the American Water Works and Electric Company but seems to assume or if not directly to state that none of the other claimants have complained of the action of the Court below, it is not out of place to refer to the supplemental transcript, a part of the record upon these appeals, and particularly to pages four and five thereof, where, under paragraph four, is stated the facts in this respect and the amounts of the several claims of these appellants. It will be seen that these petitioners actually hold a very large part of the total indebtedness of the Great Shoshone Company. and as appears fully from other parts of that transcript have prosecuted an appeal to this Court complaining of their unjust exclusion from participation in the fund or property in question here.

We do not ask the Court to consider upon this appeal what special rights these appellants have to the property or fund. They have none. Nor do they claim that they are entitled to any equitable consideration not equally open to every other general creditor of the insolvent corporation whose property is in the hands of a Receiver appointed in a general creditor's suit. But these appellants do ask that

your Honors do consider the matter from the standpoint first of the Receiver and then of the special claimants.

Looking at the question, then, from the Receiver's standpoint, why should this property, not subject to the mortgage, and already in his possession for ratable distribution to all creditors proving their claims, be taken out of his possession and ultimately distributed to but a few of those creditors? Had he not urged the defect in the mortgage and sought to retain the property for the benefit of all creditors? What more could he have done to protect the rights of those whom he represented and for whose protection he had been appointed? The property here in question was in his hands to be preserved by him for the benefit of the creditors of the insolvent corporation and not to be surrendered or given up to anyone who could not show a better title or a superior interest. The mortgagee tried to establish such interest—and failed. On what theory, or in consideration of what superior interest, do the appellees undertake to oust the Receiver from possession and to divest all other creditors of any claim upon the property?

As for appellees, they had no special right in the property and no interest in it not shared by these appellants and we think we may properly ask when and how they became entitled to a preference?

Appellees seem to rest their case almost wholly upon a claim of laches on the part of the American



Water Works and Electric Company, claiming that because it did not discover the defect in the mortgage at as early a date as did they, it thereby lost all interest in the property and had no right to intervene; and this is the view that prevailed in the Court below and the decree has been upheld by this Court. This is, we think, to fail to consider the real question involved upon the appeal and wholly to ignore the appeals presented in the supplemental record. These appeals are not referred to in the opinion of this Court and seem to have been overlooked. Here, we have no question as to the right of intervention or of the discretion of the District Judge in allowing or refusing such intervention. An appeal from the decree itself was allowed certain creditors in the name and stead of the Receiver. It will be remembered that the Court below had refused to allow the Receiver to appeal, but that, after the argument in this Court, the petition having informally been presented before, the appeal of some four creditors having very large claims was allowed here. As we have said, this is in effect an appeal by the Receiver from the decree. It presents the question whether the decree is a proper one wholly separate and distinct from any question as to any right of intervention or of laches; but in doing this we think it does no more than present exactly the same question presented by the appeal of the American Water Works and Electric Company, but it does perhaps present the question in a clearer light and freer from distracting circumstances.

Now, upon the Receiver's appeal, so taken, can it still be said that there is no error in the decree below? As we have before shown, the Receiver made exactly the same defence to the mortgage as did the appellees. The District Judge distinctly so states in his opinion. That defence was made for the purpose of limiting the extent of the lien of the Equitable Trust Company and of preserving for the benefit of the general creditors so much of the property as was not covered by that lien.

This defence was held to be good and a decree in accordance therewith was entered. But the decree went further and took from the Receiver all the property the Court had declared not to be subject to the lien because of and under the defence interposed.

It is of this part of the decree that complaint is made by the appellants whose appeal from the decree in the name and stead of the Receiver was allowed by this Court. As we have already said, this appeal is not embarrassed by the consideration of any extraneous question. It presents the single matter of the propriety of so much of the decree below as gave to appellees property in the possession of the Receiver and held by him for the benefit of general creditors.

The property was claimed by the Receiver under a defence held by the District Court to be well founded. While the opinion of the District Judge does not contain any intimation to that effect, the decree can be sustained only upon the theory that

for some reason the Receiver could not make the defence. In answer to any such suggestion we say that the Receiver was made a party to the foreclosure action for the sole reason that he was in possession of the property and represented those for whose benefit he had been appointed and so held and the Court below recognized the fact he was actually interposing the defence to the mortgage.

We respectfully urge upon the Court the consideration of the matters herein set forth. Many of them, and particularly those relating to the appeal last allowed, were apparently not in the mind of the Court when considering the case, and are not adverted to in its decision.

Every unsuccessful litigant is apt to think that the adverse decision creates an unfortunate precedent and his counsel many times shares that view, but after allowing as well as we may for such bias on our own part, we still think it must be true that it would be to interject a disagreeable circumstance into the administration of the estates of insolvent corporations under receivership in creditors' suits, if one set of creditors can by any means secure to themselves an advantage over their fellow creditors in the distribution of the common fund and it will even be more unfortunate, if it be true, that this can be done in or as a result of a judicial proceeding to

which the Receiver is a party defendant and while he is defending for the common good.

Respectfully submitted,

WYMAN & WYMAN,

*Solicitors for Petitioner,*

*American Water Works and Electric Company,*

*Intermountain Electric Company,*

*The Thousand Springs Power Company, and*

*Guaranty Trust Company of New York.*

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UNITED STATES OF AMERICA,  
STATE OF IDAHO,  
COUNTY OF ADA.

I, Frank T. Wyman, of Counsel for Petitioners above named, do hereby certify that the foregoing petition is in my judgment well founded and is not interposed for delay.

FRANK T. WYMAN,

*Solicitor for Petitioners and of Counsel.*



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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE, under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
*Appellant,*

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,  
*Appellee.*

---

AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
*Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McClelland, deceased, and JAKE M. SHANK, Interveners, and the EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913.

*Appellees.*

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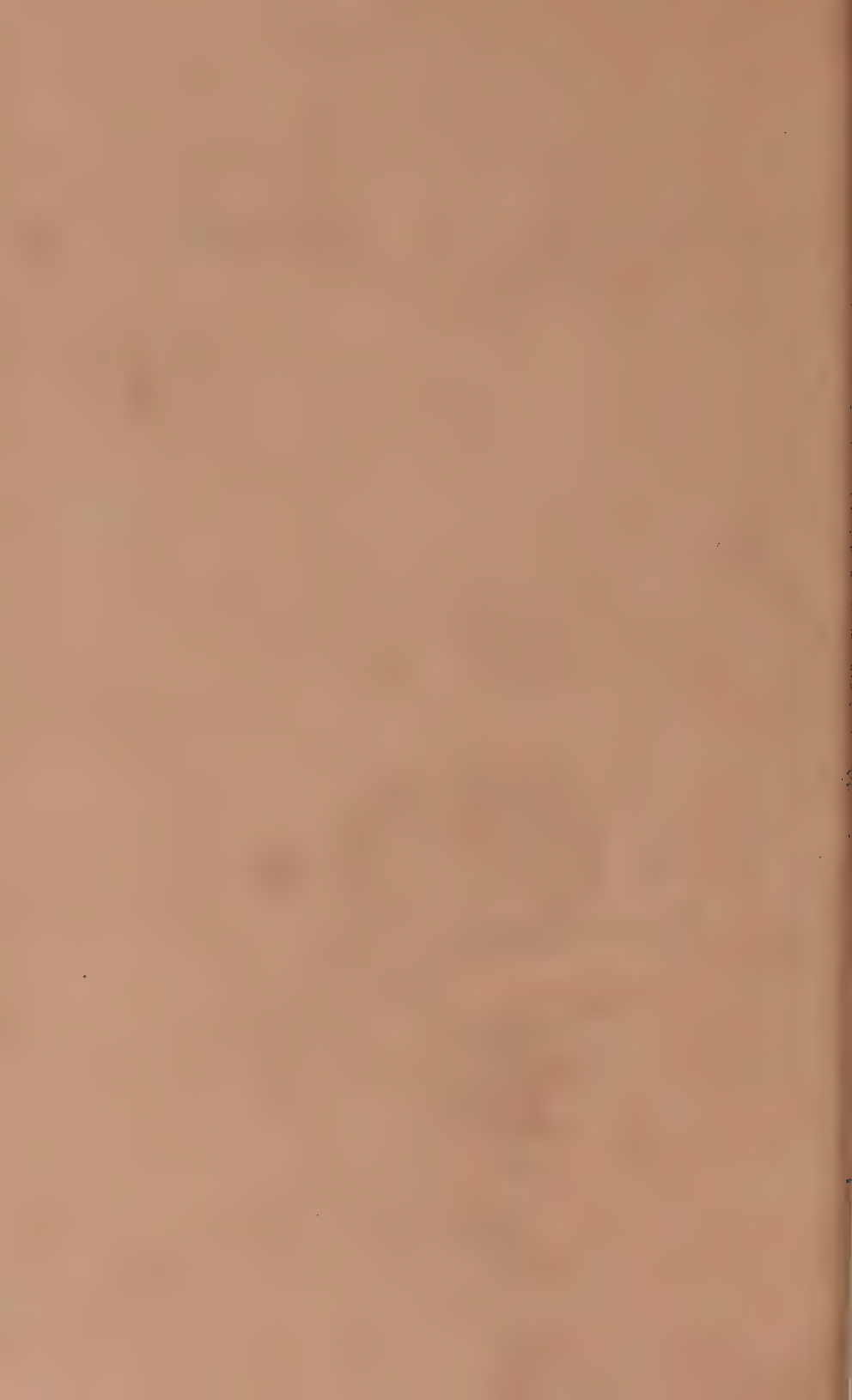
**Brief of Intervener, Jake M. Shank**  
**on Rehearing.**

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ALFRED A. FRASER,  
Boise, Idaho.

*Solicitor for Intervenor, Jake M. Shank.*

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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*Appellee.*

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
*Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, deceased, and JAKE M. SHANK, Interveners, and the EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913.  
*Appellees.*

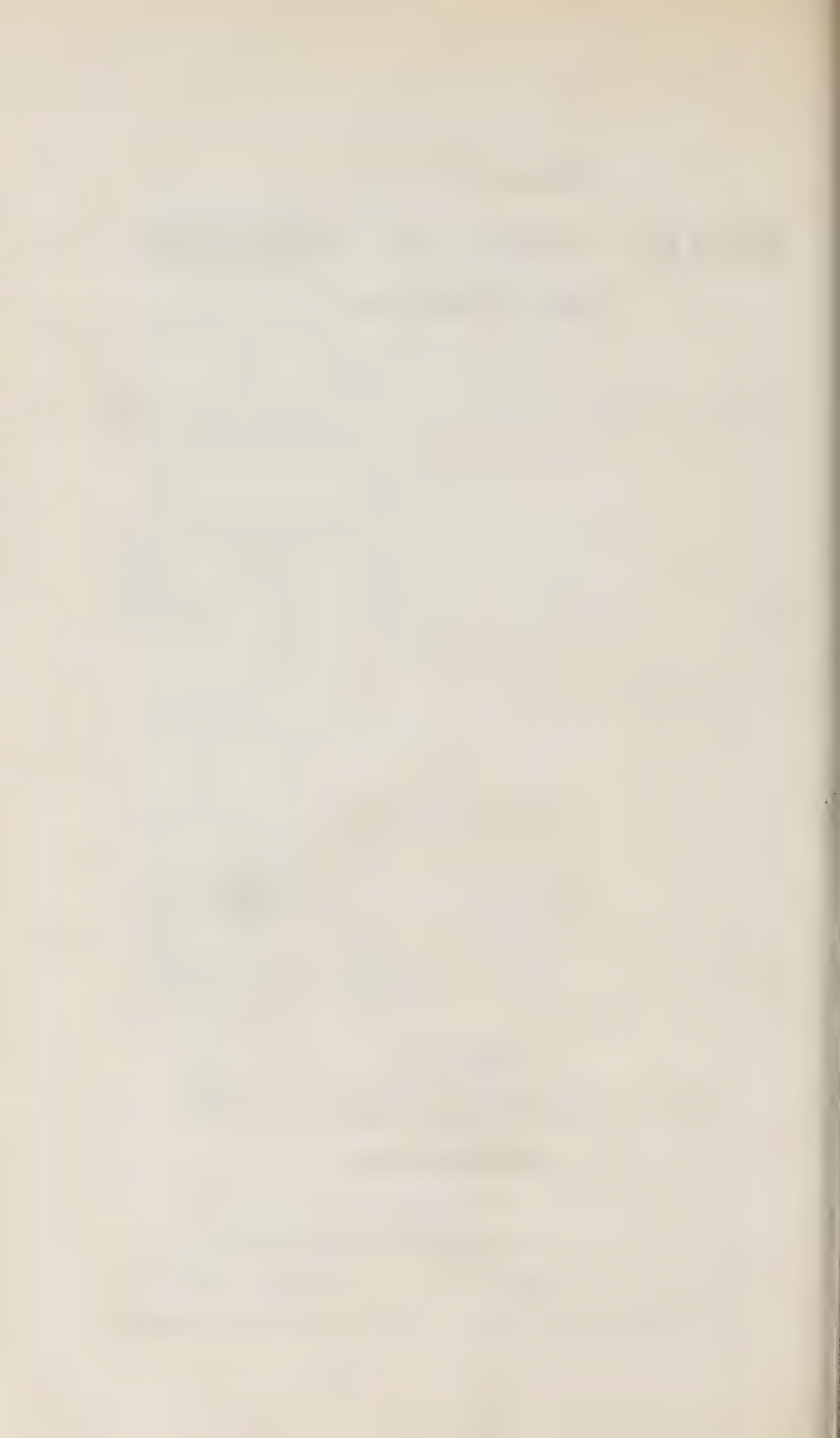
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**Brief of Intervener, Jake M. Shank**  
**on Rehearing.**

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ALFRED A. FRASER,  
Boise, Idaho.

*Solicitor for Intervenor, Jake M. Shank.*





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE EQUITABLE TRUST COMPANY OF NEW YORK, as sole TRUSTEE, under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company, dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913,  
*Appellant,*

vs.

GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, WILLIAM T. WALLACE as Receiver of Great Shoshone and Twin Falls Water Power Company, GUY I. TOWLE, and CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, Defendants, and L. M. PLUMMER and E. B. SCULL, executors of the Estate of L. L. McClelland, deceased, JAKE M. SHANK, and AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, interveners,  
*Appellee.*

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AMERICAN WATER WORKS AND ELECTRIC COMPANY, a corporation, intervener,  
*Appellant,*

vs.

GUY I. TOWLE, CARL J. HAHN, as Administrator of the Estate of Harry M. King, deceased, GREAT SHOSHONE AND TWIN FALLS WATER POWER COMPANY, a corporation, and WILLIAM T. WALLACE, as Receiver of Great Shoshone and Twin Falls Water Power Company, Defendants, L. M. PLUMMER and E. B. SCULL, Executors of the Estate of L. L. McCLELLAND, deceased, and JAKE M. SHANK, Interveners, and the EQUITABLE TRUST COMPANY OF NEW YORK, as sole Trustee under a Deed of Trust made by the Great Shoshone and Twin Falls Water Power Company dated May 1, 1910, and Supplemental Mortgages dated June 21, 1911, and April 7, 1913.  
*Appellees.*

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**Brief of Intervener, Jake M. Shank**  
**on Rehearing.**

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From an examination of the briefs of the appellants and of their petitions for rehearing it appears there are three questions of law which are presented

and urged upon the attention of this court as a ground for the reversal of this cause:

1st. That the interveners being general creditors have no standing in court to contest the validity of the mortgage given to the Equitable Trust Company of New York as trustees;

2nd. That the interveners are not entitled to any priority over other general creditors in the distribution of what is known as the unsecured creditors' fund; and,

3rd. That the receiver in the court below on behalf of all general creditors made the same attack upon the validity of the trust deed or mortgage as did these interveners.

These three questions we will discuss in the order above named.

We concede the general rule to be that a general creditor must first reduce his claim to judgment and have an execution returned *nulla bona* before he is in a position to attack a transfer of his debtor's property. This rule, however, is not absolute and it has many exceptions. When such proceedings are impossible or would be vain and involve useless expense the law does not demand it.

In Case v. Beauregard, 101 U. S. 688; 25 L. Ed. 1004, the Supreme Court said:

"It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And generally, it must be averred that judgment has

been recovered for the debt; that execution has been issued, and that it has been returned *nulla bona*. The reason is that until such a showing is made, it does not appear, in most cases, that resort to a court of equity is necessary, or, in other words, that the creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he has done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without a remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity required a meaningless form. '*Bona, sed impossibilia non cogit lex.*' It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility the issue of an execution is not a necessary prerequisite to equitable interference." (Citing authorities.)

In the case of Alder Goldman Commission Company et al, vs. Williams et al, 211 Fed. 531, the court said:

“As to the second ground the courts have established several exceptions to the general rule. One of them is that when it is shown that it is impossible or impracticable to obtain a judgment, another if a judgment has been secured, there is no property which can be subjected to an execution. Still another exception is when the property has been fraudulently conveyed by the debtor, then the remedy at law is wholly inadequate, and a resort to equity may be had. Thus, it has been held that the issuance of an execution is not a necessary prerequisite to a creditor’s bill when it appears that a debtor has no property which is subject to an execution at law and the issuance of the execution would be of no practical utility.”

Sage v. Memphis & Little Rock R. R. Co., 125

U. S. 361; 8 Sup. Ct. 887, 31 L. Ed. 694;

Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct.

525, 35 L. Ed. 112;

Talley v. Curtain, 54 Fed. 4, 4 C. C. A. 1771;

Schofield v. Ute Coal & Coke Co., 92 Fed. 269,

34 C. C. A. 334;

Iazarus Jewelry Co. v. Steinhardt, 112 Fed.

614, 50 C. C. A. 393.

“As stated in Sage v. R. R. Co., *supra*, ‘When the suing out of an execution would be an idle ceremony, causing useless expense and being of



no real benefit to the plaintiff, it is unnecessary.'

"The courts almost universally recognize the rule that where the recovery of a judgment at law is impracticable, it is not an indispensable requisite to a creditor's bill. *Kennedy v. Creswell*, 101 U. S. 641, 645, 25 L. Ed. 1075; *Case v. Beauregard*, 101 U. S. 688, 690, 25 L. Ed. 1004; *Mellen v. Moline Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; *National Tube Works v. Ballou*, 146 U. S. 517, 523, 13 Sup. Ct. 165, 36 L. Ed. 1070; *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; *Hibernia Insurance Co. v. St. Louis & New Orleans Trans. Co. (C. C.)* 10 Fed. 596; *Consolidated Tank Line Co. v. Kansas City Varnish Co. (C. C.)* 45 Fed. 7; *Guaranty Title and Trust Co. v. Pearlman (D. C.)* 144 Fed. 550."

*Talley v. Curtain et al*, 54 Fed. 43 (C. C. A.).

In *Murray v. Sioux Alaska Mining Co.*, 239 Fed. 818, this court speaking by Mr. Justice Hunt, say:

"We believe plaintiff makes a showing for equitable relief. It is not denied that the mining company is wholly insolvent, or that the claim of Murray is not justly owing. Execution would be of no avail as against the mining company. On such cases it would seem not to be necessary for the creditor first to reduce his claim to a judgment. \* \* \* Again in such a case equity will not require the question of the validity of the debt due by the mining com-

pany to Smith to be tried out in an action at law, for it would be useless to go through such a form. *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004; *Wyman v. Wallace*, 210 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 739; *Tompkins v. Calawa Mills (C. C.)* 82 Fed. 780; *Adler Goldman Commission Co. v. Williams (D. C.)* 211 Fed. 530; *Fraser v. Cole*, 214 Fed. 566, 131 (C. C. A.) 102."

The case of *Adler Goldman Commission Co.* referred to above was affirmed in *Williams v. Adler Goldman Commission Co. (C. C. A.)* Eighth Circuit, 227 Fed. 374, 142 (C. C. A.) 70.

In this case the original complainant, Guy I. Towle, was a general creditor and filed his bill on behalf of all creditors asking for the appointment of a receiver and the winding up of the affairs of the corporation. The defendant, the judgment debtors, filed an answer admitting its insolvency and the allegations of the bill of complaint and joined the complainant in asking for the appointment of a receiver. The defendant in that case, the judgment debtors, waived the question that the complainant was a general creditor. It is too late now for an outside party to raise that question.

In the matter of *Reisenberg*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, in the opinion of the court by Mr. Justice Peckham, it is said:

"In the case in the circuit court the consent of the defendant to the appointment of receivers, without setting up the defense that the com-

plainants were not judgment creditors who had issued an execution which was returned unsatisfied in whole or in part, amounted to a waiver of that defense. *Brown B. and Co. v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct. 604; *Metz. v. Cook*, 108 N. Y. 504; *Horn v. Pere Marquette R. Co.* 151 Fed. 626."

In *Horn v. Pere Marquette R. Co.*, 151 Fed. 626, the court say:

"A most absurd result would ensue if when the corporation has submitted to the jurisdiction of the court, either as a court of equity or to the local jurisdiction a creditor could come in or when brought in, might reopen the matter of jurisdiction over the debtor corporation. If such objection is not waived once for all so as to close the question as to stockholders and creditors what number of creditors would conclude the rest? In *Grand Trunk Ry. Co. v. Central Vermont Ry. Co.* (C. C.) 85 Fed. 87, 'It was very logically ruled by Judge Wheeler that a mortgagee subsequently intervening and being made defendant could not demur to the bill because the complainant who filed the bill was not a judgment creditor, being bound by the waiver of that objection by the railroad company, which had answered and consented to the appointment of a receiver.'"

Also *Pennsylvania Steel Co. v. N. Y. City Ry.* 157 Fed. (C. C.) 440.

In *Pennsylvania Steel Co. v. New York City Ry. Co.*, 157 Fed. 440 (C. C.), the court say:

“The complainants, it is true did not have judgments for their respective claims with execution returned unsatisfied but since *Hollis v. Brierfield Coal Co.* 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, it has always been understood by federal judges that in the opinion of the Supreme Court such prerequisites were solely for the benefit of the defendant and when waived by him became nonessential.”

In *Yaryan Naval Stores Co. v. B. Borchardt Co.*, 217 Fed. 758, the court say:

“Where months after a creditor’s bill has been filed and defendants have appeared and filed answer admitting the indebtedness to complainant and all equities set up in the bill and consented to appointment of receiver it is too late to urge that inasmuch as complainant’s claim has not been reduced to judgment the suit should be dismissed because the complainant had an adequate remedy at law.”

In *Rasmussen v. McKay*, 177 Fed. (C. C. A.) 141, on page 146, the court say:

“Recording a mortgage of chattels left in the possession of the mortgagor is required ‘as against the rights and interest of any third person.’ The term ‘third person’ is broad enough to include everybody outside of the immediate parties to the instrument and their privies. A simple con-



tract creditor who has not obtained a judgment is just as much a 'third person,' is just as much a stranger to the mortgage, as is the simple contract creditor who has obtained a judgment. Both have the right to enforce payment, if that can be done. The interests of both are prejudiced if the debtor's property is covered by a fraudulent transfer. If at the time of the fraudulent transfer one creditor has obtained a judgment and the other has not, the only difference is that one has proceeded farther than the other in the enforcement of his rights and the protection of his interests. And when it is said that a fraudulent transfer is void only as to judgment creditors the expression means no more than that a creditor cannot seize his debtor's property until he has obtained some process which authorizes the seizure. As stated in *Skilton v. Codington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885: 'The rule that a creditor must first recover a judgment is simply one of the procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor.'

"Our examination of the Illinois cases has led us to conclude that the Illinois courts have not decided, independently of procedure and having regard solely to rights, that simple contract creditors, irrespective of the progress they may have made in suing their debtor, are not

'third persons' within the meaning and intent of the recording statute. Indeed, we think that the case of *Long v. Cockern* goes quite a way towards holding that they are. But at all events we consider that the question is open, and that we are therefore at liberty to adopt the construction we believe to be sound and righteous. The petition to review and revise is dismissed."

In the case of *Continental Trust Co. v. Toledo St. L. & K. C. R. Co.* 82 Federal 642, was an action similar to the one at bar and Circuit Judge Taft in passing upon the right of the interveners to contest the validity of a mortgage says:

It is first said on behalf of the bondholders that the interveners should not be permitted to contest the validity of the bonds in this action, because since the consolidation the action on behalf of the creditors has become so absorbed in the foreclosure bill that the latter action dominates the whole proceeding, and that, as in a foreclosure bill a general creditor could not contest the validity or amount of the mortgage lien, the same rule must prevail here. No such effect can be given to an order of consolidation. So to hold would be, to construe the order into one dismissing the creditors' bill. Causes are consolidated only when they may proceed to judgment under one title without impeding or diminishing the remedial object and effect of the proceeding for each complainant. In a hearing on

a creditors' bill, any creditor making himself a party by presenting a claim may be heard to contest the claim of every other creditor seeking payment out of the estate of the debtor. 2 Daniell Ch. Prac. (6th Ed.) 1210, note 3; Shewen v. Vanderhorst 1 Russ. & M. 347; Owens v. Dickenson Craig & P. 48, 56; Woodgate v. Field, 2 Hare, 211, 213; Whitaker v. Wright Id. 310, 314; Field v. Titmuss, 1 Sim. (N. S.) 218, 223; Graves v. Wright, 2 Dru. & War. 77, 79; Woodyard v. Polsley, 14 W. Va. 211. I can see no reason why any creditor intervening in this action under the creditors' bill may not attack the claim of any other creditor seeking the benefit of that bill. The bondholders have made themselves parties to the creditors' bill by a committee of their number, and have set up their claims and lien. Why may not another creditor attack their claims? It is said that every creditor is bound by the concession of the bill that the bonds and mortgage are valid. Why should this be so? Undoubtedly an intervening creditor may not defeat the judgment claim of the complainant, upon which the bill is founded and the court obtains jurisdiction. Fuller v. Redman, 26 Beav. 614; Briggs v. Wilson, 5 De Gex M. & G. 12. But why should the collateral averments of the bill not necessary to the cause of action stated, or the relief prayed in the bill, concluded the intervening creditors? I can see no reason, and I am not disposed to recognize

or enforce unnecessary estoppels in procedure which would only increase the necessity for additional litigation. It must be held, therefore, that the petitioners may attack, under the creditors' bill, the validity and extent of the mortgage lien. And those creditors who have expressly conceded the validity and extent of the bonds may have leave to amend their petition by striking out the concession."

The allowance of the claim in the receivership proceedings is a sufficient judgment upon which to support this action.

Plume and Atwood Manuf. Co. v. Baldwin,  
87 Fed. (C. C.) 185;

Ruggles v. Cannedy, 127 Cal. 290, 53 Pac.  
911, 59 Pac. 27;

Roan v. Winn, 93 Mo. 503, 4 SW. 736.

The amount and justness of the claim of the intervener, Jake Shank, has never been questioned by any party to the action. The books of the judgment debtor admitted the correctness of this claim.

The order of the court allowing this claim is as follows:

"Upon statement of receiver, William T. Wallace, that the above named claim appears upon the books of the Great Shoshone and Twin Falls Water Power Company as a valid and existing claim against said company and it further appearing that the said receiver knows of no reason why said claim should not be allowed." (Transcript, page 341.)



The court entered an order requiring all parties interested in the matter to file objections against the allowance of this claim on or before January 17, 1916, (T. p. 346). No objection has been filed as against the allowance of this claim.

We contend that being the only creditors who saw fit to attack the validity of this mortgage and who have borne the labor and expense of the trial and who by their efforts have provided the fund for the payment of creditors are entitled to a priority over all other creditors as to such fund. This rule is announced in 12 Cyc. 61, as follows:

“The principle is well established that where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly files a creditors’ bill to subject such property of the debtor to the satisfaction of his judgment, he acquires a lien on such property and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors, even though other creditors have judgments obtained prior to the time when the complaining creditor obtained his; and to the fastening or preservation of such a lien no injunction or attachment or levy on the property is necessary.”

The two leading cases in America on this question are the cases of *Edmeston v. Lyde*, 1 Paige Ch. Rep. 636, and *McDermott et al. v. Strong*, 4 John, Ch. R. 687.

In Edmeston case, the court say:

“And on further examination it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit.”

And again:

“If the creditor whose execution is first returned unsatisfied pursues the race of legal diligence, by the commencement of a suit here, he will obtain the reward of his vigilance; but if he abandons the pursuit, or lingers on the way, before he has obtained a specific lien, he has no right to complain if another creditor obtains a preference by superior vigilance.”

And in the case of McDermott v. Strong, Chancellor Kent said:

“Though it be the favorite policy of this court to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court.”

The above two cases are cited with approval by the Supreme Court of the United States in the case

of Freedman's Saving & Trust Company v. Earle, 110 U. S. 710. In this case the court say:

“It is to be noted, therefore, that the proceedings is one instituted by the judgment creditor for his own interest alone, unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause; and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dates from the filing of the bill. ‘The creditor’, says Chancellor Walworth, in *Edmeston v. Lyde*, 1 Paige Ch. 637-640, ‘whose legal diligence has pursued the property into this court, is entitled to a preference as the reward of his vigilance;’ and it would ‘seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit’. As his lien begins with the filing of the bill, it is subject to all existing incumbrances, but is superior to all of subsequent date.”

And again, the court say:

“The passage cited from the opinion in *Day v.*

Washburn, *supra*, speaks of the preference thus acquired by the execution creditor as a legal preference. It was distinctly held so to be by Chancellor Kent in *McDermott v. Strong*, 4 Johns Ch. 687. He there said: 'But this case stands on stronger ground than if it rested merely on the general jurisdiction of this court, upon residuary trust interest in chattels, for the plaintiffs come in the character of execution creditors, and have thereby acquired, by means of their executions at law, what this court regards as a legal preference or lien on the property so placed in trust;' and 'admitting that the plaintiffs had acquired by their executions at law, a legal preference to the assistance of this court (and none but execution creditors at law are entitled to that assistance), that preference ought not, in justice, to be taken away. Though it be the favorite policy of this court to distribute assets equally among creditors, *pari passu*, yet, whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by this court.' The decision in that case was made, giving the priority to the execution creditors who filed the bill, when, otherwise, by virtue of an assignment by the debtor who was insolvent the proceeds of the equitable interest sought to be subjected would have been distributed ratably among all creditors."



In the case of Federal Insurance Co. v. Detroit Fire & Marine Company, Circuit Court of Appeals of the Sixth Circuit, 202 Fed. 648, on page 656, the court say:

“No distinction is perceived between the principle that should be applied here and that which prevails in equitable proceedings brought to enforce judgments against interests of debtors that cannot be reached by ordinary legal process. If priority is sought in such proceedings, the suit must be limited to that object, and not in terms extended to all creditors of the same class or creditors generally. This principle is applied in a variety of cases. For instance, in *George v. St. Louis Cable & W. Ry. Co.* (C. C.) 44 Fed. 122, 123, the late Circuit Judge Thayer, when speaking upon rehearing of a proceeding by judgment creditors to subject property that could not be effectively reached by execution at law, said:

“ ‘I have no doubt that the three complainants by whom the billing this case was filed might have secured a priority by filing the same for their own benefit; but they did not do so. By the very terms of the bill, they professed to be acting not only for themselves, but ‘in behalf of all and singular, the other judgment creditors of the respondent.’ The effect was to waive the advantage they might have obtained by moving in their own behalf. The result is that the suit, in contemplation of law, has from the beginning

been prosecuted by the original complainants in behalf of all judgment creditors who might elect to come in and take advantage of what had been done in their behalf.'

"The same principle was recognized by Justice Bradley in *Johnson v. Waters*, 111 U. S. 640, 674; 4 Sup. Ct. 619, 637 (28 L. Ed. 547), and by Justice Mathews in *Freedman's Savings & Trust Co. v. Earle*, 110 U. S. 719, 716; 4 Sup. Ct. 226, 229 (28 L. Ed. 301), where he states the rule thus:

" 'It is to be noted, therefore, that the proceedings is one instituted by the judgment creditor for his own interest alone unless he elects to file the bill also for others in a like situation, with whom he chooses to make common cause.' "

In *Seymour v. McAvoy*, 53 Pac. 946, the Supreme Court of California say:

"A judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants. The court therefore did not err in refusing to bring in as parties other judgment creditors who had not themselves commenced any such suit."

In *Reis v. Ravens*, 68 Ill. App. 53, the court say:

“It is a well established doctrine that a creditor who has by calling to his aid a court of equity and by the exercise of his superior diligence discovered and uncovered property which could not be discovered and seized upon execution at law is entitled to a preference over other creditors.”

In *Senter v. Williams et al.*, 32 SW. 490:

“Though it is a favorite policy of a court of equity to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by the court. *McDermott v. Strong*, 4 Johns. Ch. 587. Here the appellee to whom the reward of diligence was granted filed their bill to set aside the assignment for fraud and succeeded. The appellants contented themselves with standing by and seeing the appellees carry on the contest at their own labor and expense. This seems to come within the maxim ‘*Vigilantibus non dormientibus jura subservient*’. The creditor who first files his bill obtains thereby a priority and is entitled to be first paid out of the proceeds of the assets if there are no valid prior liens. *Clark v. Figgins*, 31 W. Va. 157, 5 SE. 643, and cases there cited. Section 577 Beach. Mod. Eq. Prac. lays down the rule as follows:

“A creditor who delays asking to be admitted as a complainant until after the case has been finally heard should be admitted, unless his admission is by consent only on condition that those who have expended their labor and incurred the risk of trying the case be first paid. In the case of *Smith v. Craft*, 11 Biss. 340, 12 Fed. 856, Judge Gresham maintained, that ‘after the announcement of the finding of the court in favor of the complainant attacking the fraudulent preference if other creditors come in and ask to be made parties to the suit as co-complainants this may be done, but their claims will be postponed in favor of the original complainants.’ ‘It is clear that creditors filing a bill to set aside a fraudulent conveyance acquire a specific lien and are entitled to priority over other creditors at large.’ *Wallace v. Treacle*, 27 Grat. 457.”

We particularly call the court’s attention to the case of *Clark v. Figgins, et al.*, 5 S. E. 643. The case was decided in the Supreme Court of Appeals of West Virginia. The facts in the case are very similar to the case at bar, and the court, after reviewing the authorities upon this question at length, say:

“In *Rappleye v. Bank*, 93 Ill. 402, Mr. Justice Sheldon said, in delivering the opinion of the court: ‘Although appellants might have proceeded and have avoided the trust deed, and have subjected the estate thereby conveyed to



the satisfaction of his judgment, or have had the lots sold on execution, he did not choose to assume that burden or expense. Appellee then assumed the undertaking of avoiding the trust deed, and succeeding in affecting the removal of the incumbrance, encountering all the expense and labor thereof. It is through this proceeding of appellee that this estate conveyed by the trust deed has been secured for application to the satisfaction of these judgments. Appellant now comes forward to appropriate to himself all the benefit. It does not seem just, and we think, under the equitable doctrine which courts apply in analogous cases, and the decision in *Lyons v. Robbins*, 46 Ill. 279, appellee is fairly entitled to a preference, as a reward of its diligence.' Here the three firms to whom the reward of diligence was granted, filed their answers in the court below, and were the only defendants who did so, attacking the said trust deed for fraud. They were fought in this by the plaintiffs in that suit, who were seeking a preference by trying to show the deed was valid. The other defendants contented themselves by standing idly by and seeing these active defendants carry on the contest at their own labor and expense. When these answers were filed, *quo ad*, these defendants claimed the effect was the same as if they had filed a bill for the purpose of having said trust deed declared fraudulent, and they may be regarded in the nature

of cross-bills. At that time there were no prior liens on the property, as all the attachments were subsequently declared void. These three firms were beaten in the court below, and decreed to pay costs with Dager & Co., Maddux Bros., H. N. Baily, and Allemony, Bear & Co. Three of these parties were applied to by Ruffner Bros., Arnold Abney and Hurst, Purnell and Co. to join them in an appeal and declined. None of the others came forward to join in the appeal. These three firms alone applied for the appeal, which was granted, and the decree reversed, and trust deed set aside as fraudulent. It seems to us this cause, in all its circumstances, is within the maxim, '*vigilantibus, non dormientibus, jura subveniunt.*' There would be no reward to the vigilant if these parties were now compelled to step aside, and let those who fought them persistently all through the cause, in both courts, and those who stood by and did nothing, take the fruits of their labor and expense, or to be compelled to divide it with them."

"A creditor whose legal diligence has pursued property which cannot be reached at law into a court of chancery is entitled to a preference as the reward of his diligence."

Edmeston v. Lyde, 1 Paige, 637, 2 L. Ed. 781;  
 Corning v. White, 2 Paige, 567, 2 L. Ed. 1031;  
 McDermott v. Strong, 4 Johns. Ch. 687, 1 L.  
 Ed. 1981;

Weed v. Pierce, 9 Cow. 722;  
 Claflin v. Lisso, 27 Fed. Rep. 420;  
 Roberts v. Albany & W. S. R. Co., 25 Barb.  
 662;  
 Storm v. Waddell, 2 Sandf. Ch. 494, 7 L. Ed.  
 675;  
 Pullis v. Robinson, 73 Mo. 201, 39 Am. Rep.  
 397;  
 First Nat. Bank v. Gage, 93 Ill. 172;  
 Logan v. Robbins, 46 Ill. 277.

We are somewhat surprised that counsel for the appellants in their brief on rehearing should claim that the receiver contested the validity of the mortgage or trust deed in the court below. We assert here without fear of contradiction that as a matter of fact the receiver did not by pleading or by argument in the trial of the court even suggest to the court that the mortgage or trust deed was void as to the personal property for the reasons advanced by these interveners or for any other reason or at all. An examination of the record in this case will conclusively prove this statement to be true.

At the date of the trial the receiver was in default for want of an answer and the court entered an order requiring the receiver to file an answer to the bill for foreclosure. On page 141 of the transcript we find the following:

“The court then directed William T. Wallace as receiver of the Great Shoshone and Twin Falls Water Power Company, duly appointed

in Equity case number 509, pending in this court, to file his answer in this cause by 10 o'clock in the forenoon of Oct. 26th, 1915, and said receiver within such time filed his answer as directed."

The answer which the receiver filed admits the validity of the mortgages and that the lien of the same attaches to all property of the insolvent debtor, real, personal or mixed.

Paragraph four of the bill of complaint, among other things, alleges:

"In and by said deed of trust said Great Shoshone and Twin Falls Water Power Company in order to secure the due and punctual payment of the principal and interest of all the aforesaid bonds issued and at any time outstanding, granted, bargained, sold, alienated, remised, released, conveyed, confirmed, assigned, transferred and set over and unto said trust company of America and James D. O'Neil as trustees and their successor or successors in the trust therein created all of the various parcels, premises, properties, rights, etc., and all other property, real, personal and mixed said Great Shoshone and Twin Falls Water Power Company, whether then owned or thereafter acquired as enumerated or referred to in said deed of trust dated May 1st, 1910.

"TO HAVE AND TO HOLD, all and singular said plants, works and other property and



rights, etc., in fee simple forever, in trust nevertheless for the equal and pro rata benefit of all holders of said bonds and coupons.”

(Trans. p. 10 and 11.)

This allegation of the bill of complaint is not denied by the receiver in the answer filed by him.

Again in paragraph Sixth of the bill of complaint and in paragraph Sixteenth of the same the complainant alleges that it has a lien upon all property of the judgment debtor, real, personal and mixed, in favor of the bondholders, and these allegations are not denied by the answer of the receiver. (Trans. p. 12 and 28.)

It was stipulated in this case that the value of the personal property which the trial court decided was not subject to the lien of the mortgage should for the purposes of this action be considered as of the value of \$45,000. This amount was just about sufficient to cover the claims of the interveners. This stipulation was not signed by the receiver or his attorney. If the receiver in the trial court had also made the attack upon this mortgage on behalf of general or other creditors why was he not a necessary party to this stipulation? The fact is, that at the time this stipulation was signed by all other counsel it was not even suggested by any of the parties that the signature of the receiver was necessary to such a stipulation as it was not considered that he had any interest in the matter whatever. The only intimation in the record from which counsel now contend

that the receiver had attacked the validity of this mortgage is found in the language of the trial court in his opinion on page 181 of the transcript, within which he states:

“By intervening creditors and by the receiver it is urged that as to the personal property which the instrument purports to cover, it is void.”

This statement of the trial judge that the receiver urged that the instrument was void is in direct conflict with all other parts of the record. The trial judge at the time he wrote this opinion did not have before him for consideration the question as to whether or not the receiver was entitled to participate in the unsecured creditors' fund, but when this identical question was presented to him he held that the receiver had not made any attack upon the validity of the mortgage and that the receiver had filed no pleading in the action which would ~~not~~ warrant the court in granting relief of such character to the receiver.

Upon page 307, 309 of the transcript the trial judge disposes of this question as follows:

“The judgment is entirely the fruit of their diligence, in the exercise of which they took nothing from the petitioner. The petitioner had the same right as they to come into the suit, of the pendency of which it undoubtedly had knowledge. If it did not join hands with the plaintiff to defeat the interveners, still, having

knowledge of the pendency of the foreclosure suit, and presumably being advised of its legal rights, it chose to remain silent and inactive, thus avoiding the expense and peril of litigation, until after these interveners have succeeded, and then when they are about to receive the fruits of their diligence, it seeks to step in and seize the same. It intimates no reason why, though having knowledge that the plaintiff trustee was seeking to appropriate the entire assets of its debtor to the payment of the bonds, it never lifted a finger in resistance, or suggested that the receiver do so. The record does not disclose what the real value of the property is upon which the interveners were awarded a first lien; it may have been very much in excess of the aggregate of their claims. They entered into a stipulation with the plaintiff, agreeing upon a value which was sufficient, but only sufficient, to take care of their claims in full. Had it been known that other creditors would seek to share in such lien it is possible that a much greater value could have been established, but so far as appears the petitioner gave no notice of its intention to assert the present claim until after such stipulation had been entered into. *It is further suggested that the receiver might have asserted for all creditors the rights which the court recognized in the interveners. It is extremely doubtful, to say the least, whether the receiver could have secured a footing to assert*

*such rights, even upon behalf of the interveners, whose claims had been allowed in the general creditors' suit. But while the petitioner's claim had been presented, it had never been passed upon or allowed, and it may be questioned therefore whether it fell within the principle of law upon which the recognition of the interveners' liens in the foreclosure suit was predicated. The trustee earnestly contended that before anyone could attack the validity of the chattel mortgage upon the ground relied upon by the interveners they must show some interest in or lien upon the property; and such undoubtedly is the general rule. How could the receiver have shown such interest in or lien upon the property in behalf of the petitioner? However that may be, upon an examination of the receiver's answer and of the proofs it will be seen that they were not sufficient to justify the court in finding or declaring any lien in favor the petitioner or any other creditors. Proofs of the existence and status of claims were offered only by the interveners and only touching their claims. The court had no basis upon which to declare a lien in favor of the petitioner."* (Italics ours.)

Respectfully submitted,

ALFRED A. FRASER,

Boise, Idaho.

*Solicitor for Intervenor, Jake M. Shank.*



United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

EDWARD WHITE, Commissioner of Immigration  
at the Port of San Francisco,  
Appellant,

vs.

WONG QUEN LUCK,  
Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Northern District of California,  
First Division.

---

Filed

10 1906

J. D. Huntington,  
Clerk



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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EDWARD WHITE, Commissioner of Immigration  
at the Port of San Francisco,  
Appellant,

vs.

WONG QUEN LUCK,  
Appellee.

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**Transcript of Record.**

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Upon Appeal from the United States District Court for  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas  
Corpus.

**Names and Addresses of Attorneys of Record.**

For the Respondent: THE UNITED STATES AT-  
TORNEY.

For the Petitioner: JOSEPH P. FALLON, Esq.,  
San Francisco, Calif.

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*In the District Court of the United States, in and for  
the Northern District of California, First Divi-  
sion.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on Be-  
half of WONG QUEN LUCK.

**Praeceptum for Transcript of Record.**

To the Clerk of Said Court:

Sir: Please make copies of following papers to  
be used in preparing transcript on appeal in the  
above-entitled cause:

1. Petition for Writ of Habeas Corpus consisting  
of the first five pages thereof, thus omitting  
Exhibit "A."
2. Order to Show Cause.
3. Marshal's Return of Service of Order to Show  
Cause.
4. Demurrer to Petition.

5. Stipulation of Attorneys that Immigration Record and Exhibits be Filed and Considered Part of Petition.
6. Order Overruling Demurrer, and Ordering Writ to Issue.
7. Writ of Habeas Corpus and Marshal's Return Thereto.
8. Return to Petition and Stipulation Set Forth on Last Page of Said Return.
9. Minutes of Hearing Before District Court, Nov. 12, 1915.
10. Order of Discharge.
11. Petition for Appeal.
12. Assignment of Errors.
13. Order Allowing Appeal.
14. Notice of Appeal. [1\*]
15. Stipulation and Order That Respondent's Exhibits "A" and "B" may be Transferred on Appeal in Their Original Form.
16. Stipulation as to Hearing on Return to Petition on Nov. 12, 1915.

JOHN W. PRESTON,  
C. G. H.

United States Attorney.

Dated this 19th day of May, 1916.

[Endorsed]: Filed May 19, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

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\*Page-number appearing at foot of page of original certified Record.



*In the District Court of the United States, in and for  
the Northern District of California.*

In the Matter of the Application of WONG HONG,  
for a Writ of Habeas Corpus for and on Be-  
half of WONG QUEN LUCK.

**Petition for a Writ of Habeas Corpus.**

To the Honorable MAURICE T. DOOLING, Judge  
of the Above-entitled Court.

Petition of Wong Hong respectfully shows:

I.

That your petitioner is a resident of the City and  
County of San Francisco, State of California; that  
this petition is made for and on behalf of Wong  
Quen Luck by said petitioner for the reason that the  
father of said Wong Quen Luck is at present out of  
the City and County of San Francisco; and for the  
further reason that Wong Quen Luck is in custody  
and cannot make the application for and on behalf  
of himself.

II.

That Wong Shoon Jung is the father of Wong  
Quen Luck; that said Wong Shoon Jung was born  
in the United States and is a citizen thereof, and a  
resident of Riverside, Riverside County, California.

III.

That said Wong Quen Luck, the detained person  
on whose behalf this petition is made, is the minor  
son of Wong Shoon Jung, and is a citizen of the  
United States.

## IV.

That the said Wong Quen Luck is unlawfully imprisoned, detained, confined and restrained of his liberty by Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, at the Immigration [3] Station at Angel Island or in some other place in the Northern District of California and is about to be deported from the United States to China.

## V.

That the illegality of such imprisonment, restraint, detention and confinement consists of this, to wit:

That the said Wong Quen Luck made application to be admitted to the United States as a citizen thereof and as the minor son of Wong Shoon Jung. That subsequent to said application to be so admitted to the United States, the said Wong Quen Luck was by the Secretary of Labor of the United States, refused and denied a fair hearing in good faith, and was by the Secretary of Labor by a manifest abuse of the discretion committed to him by law and against the spirit and letter of the law, denied the right to enter the United States, and in this respect petitioner alleges:

That the said Wong Quen Luck, during the month of June, 1915, arrived at the Port of San Francisco from China and made application to the Commissioner of Immigration at the Port of San Francisco for admission to the United States as a citizen thereof, and as a minor son of Wong Shoon Jung.

That thereafter said application for admission was

denied by said Commissioner, that thereafter, upon application made on behalf of said detained person, Wong Quen Luck, the said Commissioner, granted and permitted new and further testimony to be submitted by said detained person in support of said application for his admission to the United States; that thereafter said detained person Wong Quen Luck, did submit new and further testimony to said Commissioner in support of his application for admission to the United States; that thereafter as your petitioner is informed and believes and therefore alleges the fact to be, the inspector [4] who took said testimony under the direction of said Commissioner strongly recommended that said Wong Quen Luck be admitted to the United States and that he be permitted to reside therein and that said application for admission be granted and said petitioner alleges upon information and belief that said recommendations were so made for the reason that the said testimony so submitted clearly established the right of said detained person to enter the United States and reside therein.

That your petitioner is informed and believes and therefore alleges the fact to be that the Secretary of Labor thereafter without reason refused, neglected and failed to consider said testimony so submitted and said recommendation so made, and immediately thereafter denied said Wong Quen Luck the right to enter the United States and ordered the said Commissioner at the Port of San Francisco to deport the said Wong Quen Luck to China.

That your petitioner is informed and believes and

therefor alleges the fact to be that said Secretary of Labor did without reason consider other matters which were never incorporated in any record had or produced at the Port of San Francisco, the exact character and nature of which matter is now unknown to your petitioner and to Wong Quen Luck, and that at no time did the said Wong Quen Luck have an opportunity to rebut, deny, explain or overcome said matter.

#### VI.

A copy of the testimony taken in said matter before the Inspector of Immigration is attached hereto, made a part hereof and marked Exhibit "A."

#### VII.

That the said Wong Quen Luck, said detained person, has exhausted all the rights and remedies and has no further remedy before the Department of Labor, and that unless the writ of habeas [5] corpus issue out of this court as prayed for herein directed to the said Samuel W. Backus, Commissioner as aforesaid, in whose custody the body of the said Wong Quen Luck now is, the said Wong Quen Luck will be forthwith deported from the United States to China without due process of law.

WHEREFORE, your petitioner prays that the writ of habeas corpus be issued by this Honorable Court directed to and commanding the said Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, to have and produce the body of the said Wong Quen Luck before this Honorable Court at its courtroom in the City and County of San



Francisco, in the Northern District of California, at the opening of court on a day certain, in order that the alleged cause of imprisonment, detention, confinement and restraint of the said Wong Quen Luck and the legality or illegality thereof may be inquired into and in order that, in case the said imprisonment, detention, confinement and restraint are unlawful and illegal, that the said Wong Quen Luck be discharged from all custody, detention, imprisonment, confinement and restraint.

Dated this 28th day of September, 1915.

JOSEPH P. FALLON,  
Attorney for Petitioner. [6]

United States of America,  
State and Northern District of California,  
City and County of San Francisco,—ss.

Wong Hong, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof, that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WONG HONG (Chinese Characters).

Subscribed and sworn to before me, this 28th day of September, 1915.

[Seal] R. B. TREAT,  
Notary Public in and for the City and County of San  
Francisco, State of California. [7]

(Here follows Exhibit "A.")

[Endorsed]: Filed Sep. 28, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [8]

*In the District Court of the United States, in and for  
the Northern District of California.*

In the Matter of WONG QUEN LUCK, on Habeas  
Corpus.

**Order to Show Cause.**

Upon reading and filing the verified petition of Wong Hong praying for the issuance of the writ of habeas corpus, and good cause appearing therefor:

IT IS HEREBY ORDERED that Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco, at Angel Island, be and appear before the above-entitled Court, Department Number One thereof, on Saturday the 2d day of October, 1915, to show cause, if any he have, why a writ of habeas corpus should not issue in this matter and the petition granted as prayed, and this at the hour of 10 o'clock of said day, and

IT IS FURTHER ORDERED that said Wong Quen Luck be not removed from the jurisdiction of this Court until the further order of this Court, and

IT IS FURTHER ORDERED that a copy of this order be served upon said Samuel W. Backus or such other persons having said Wong Quen Luck in custody as an *office* of said Samuel W. Backus.

Dated Sept. 28, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Sep. 28, 1915. W. B. Maling, Clerk.  
By C. W. Calbreath, Deputy Clerk. [9]

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas  
Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Now comes the respondent, Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled matter and for grounds of demurrer alleges:

**I.**

That said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus or any relief thereon.

**II.**

That said petition is insufficient in that the statements in the petition relative to the record of the testimony taken on the trial of the applicant, are statements of conclusions of law.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JOHN W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.

Service of the within by copy admitted this — day of —, 191—.

JOSEPH P. FALLON,  
Attorney for Petitioner.

[Endorsed]: Filed Oct. 1, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK on Habeas  
Corpus.

**Stipulation (That Immigration Record and Exhibits  
be Filed and Considered Part of Petition).**

It is hereby stipulated and agreed by and between J. P. Fallon, of counsel for applicant, in the above-entitled matter, and Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and John W. Preston, United States Attorney in and for the said district, that the record and exhibits of Samuel W. Backus, Commissioner of Immigration at the Port of San Francisco, Cal., in the matter of the application of said Wong Quen Luck for admission into the United States be filed and considered a part of the petition for a writ of habeas corpus in said matter.



Dated Oct. 8, 1915.

JNO. W. PRESTON,  
United States Attorney,  
Attorney for Respondent.  
JOSEPH P. FALLON.  
Attorney for Petitioner.

[Endorsed]: Filed Oct. 9, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

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*In the District Court of the United States, in and  
for the Northern District of California, First  
Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas  
Corpus.

**Order Overruling Demurrer, and Ordering Writ to  
Issue, etc.**

JOHN W. PRESTON, Esq., United States At-  
torney, and CASPAR A. ORNBAUN, Esq.,  
Assistant United States Attorney, Attor-  
neys for the Respondent.

JOSEPH P. FALLON, Esq., Attorney for  
Petitioner.

The demurrer to the petition for a writ of habeas  
corpus herein is overruled, and said writ will issue  
returnable November 6th, 1915, at 10 o'clock A. M.

October 25th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Oct. 25, 1915. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [12]

*In the District Court of the United States, in and  
for the Northern District of California, First  
Division.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas  
Corpus.

**Writ of Habeas Corpus.**

The President of the United States of America, to  
the Commissioner of Immigration, Port of San  
Francisco, Calif., Angel Island, California,  
Greeting:

YOU ARE HEREBY COMMANDED that you  
have the body of the said person by you imprisoned  
and detained, as it is said together with the time and  
cause of such imprisonment and detention, by what-  
soever name the said person shall be called or  
charged, before the Honorable M. T. Dooling, Judge  
of the District Court of the United States, for the  
Northern District of California, at the courtroom of  
said court, in the City and County of San Francisco,  
California, on the 6th day of November, A. D. 1915,  
at 10 o'clock A. M. to do and receive what shall then  
and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS  
WRIT.

WITNESS, the Honorable M. T. DOOLING,  
Judge of the said District Court, and the seal thereof

at San Francisco, in said District, on the 1st day of November, A. D. 1915.

[Seal]

W. B. MALING,  
Clerk.

By C. W. Calbreath,  
Deputy Clerk. [13]

**Return on Service of Writ.**

United States of America,  
N. District of California,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the Commissioner of Immigration by handing to and leaving a true and correct copy thereof with Edward White who is the Commissioner of Immigration at the Port of San Francisco, personally at San Francisco in said District on the 4th day of November, A. D. 1915.

J. B. HOLOHAN,  
U. S. Marshal.

[Endorsed]: Filed Nov. 4, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

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*In the District Court of the United States, in and  
for the Northern District of California, First  
Division.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on Be-  
half of WONG QUEN LUCK.

**Return (to Writ of Habeas Corpus).**

Now comes Edward White, Commissioner of Im-

migration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the writ of habeas corpus heretofore granted by said Court, admits, denies and alleges as follows:

Admits that petitioner is a resident of the City and County of San Francisco, State of California and that petition is made for and on behalf of Wong Quen Luck.

Denies that Wong Shoon Jung is the father of Wong Quen Luck.

Denies that Wong Quen Luck is the son of Wong Shoon Jung and further denies that Wong Quen Luck is a citizen of the United States.

Denies that the said Wong Quen Luck is unlawfully imprisoned, detained, confined and restrained or is unlawfully imprisoned or detained or confined or restrained of his liberty by Samuel W. Backus, or by anyone else at the Port of San Francisco at the Immigration Station at Angel Island or in some other place in the Northern District of California or at any other place or at all and in this connection respondent alleges that the said Wong Quen Luck is lawfully and rightfully held by the said immigration officers at Angel Island, California, and is about to be deported from the United States. [15]

Admits that Wong Quen Luck made application to be admitted to the United States as a citizen thereof and as the minor son of Wong Shoon Jung.

Denies that subsequent to said application the said Wong Quen Luck was refused and denied or refused or denied a fair hearing in good faith and denies that the said Secretary of Labor by abuse of discre-



tion denied the right to enter the United States.

Admits that the said Wong Quen Luck during the month of June, 1915, arrived at the port of San Francisco from China and made application to the Commissioner of Immigration at said port for admission to the United States as a citizen and as the minor son of Wong Shoon Jung.

Admits that thereafter said application for admission was denied by said Commissioner.

Denies that thereafter upon application of the said Wong Quen Luck or otherwise, the said Commissioner granted and permitted or granted or permitted new and further testimony to be submitted by the said detained person.

Denies that the said Wong Quen Luck submitted new and further testimony to said Commissioner in support of his application for admission to the United States and in this particular respondent alleges that the examination of said detained person was never reopened for the hearing of additional testimony but was a continuous examination and investigation until all of the evidence concerning said detained person was fairly introduced.

Denies that *any* subsequent hearing of testimony taken in behalf of applicant or at any other time or at all the said Commissioner recommended that the said Wong Quen Luck be admitted to the United States; denies that the said Commissioner recommended that the said Wong Quen Luck be permitted to reside [16] in the United States and further denies that the said Commissioner recommended that the said application for admission be

granted to said applicant, and in this connection respondent alleges that after hearing all of the evidence introduced with reference to the application of said applicant to enter the United States, the said immigration authorities recommended that the application of said applicant be denied, said recommendation being based upon the finding that the relationship claimed to his alleged father was not established to the satisfaction of the said immigration authorities.

Denies that the Secretary of Labor without reason refused, neglected and failed or refused or neglected or failed to consider the testimony and all of the testimony submitted on behalf of the applicant and denies that the said Secretary of Labor considered other matters in rendering his decision in this case other than the evidence submitted in behalf of said applicant, and denies that said applicant had no opportunity to rebut, deny and explain or rebut or deny or explain all of the evidence submitted in said case and in this connection respondent alleges that said applicant was presented with and had the opportunity to answer and rebut any and all evidence introduced either for or against said applicant.

As a further separate and distinct answer and defense to the petition on file herein and to the writ of habeas corpus heretofore granted by said court, respondent alleges that since the application of said applicant Wong Quen Luck was made to enter the United States through the Port of San Francisco, certain testimony and other evidence was taken concerning his said entry by the immigration authori-

ties acting for and on behalf of the Government of the United States, and in this connection respondent files with this answer all of the evidence, testimony, views of the [17] immigration was taken and marked exhibit "A," attaches to and incorporates into and makes a part of this answer the said testimony, evidence and other proceedings which compose the record known as the official record of the Department of Labor and duly certified as such; that said record contains all of the testimony, evidence and other proceedings that were before the said Secretary of Labor of the United States and which were considered by him at the time that the said warrant of deportation was issued.

WHEREFORE, respondent prays that the said petition for writ of habeas corpus and the said writ of habeas corpus be denied and dismissed and that said applicant be remanded to the custody of the respondent for deportation as provided for in the said warrant of arrest heretofore issued by the Secretary of Labor of the United States and for such other and further relief as to this court seems equitable and just.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney,

Attorneys for Respondent.

**Stipulation Re Official Record of Department of  
Labor, etc.**

It is hereby stipulated and agreed by and between the United States Attorney and the applicant,

through his attorney Joseph P. Fallon, that the evidence, testimony and proceedings referred to in the within answer and which compose the record known as the official record of the Department of Labor and duly certified as such, may and the same is hereby incorporated into and made a part of this answer without being actually attached thereto.

JNO. W. PRESTON,

U. S. Attorney,

CASPER A. ORNBAUN,

Asst. U. S. Attorney,

Attorneys for Respondent.

JOSEPH P. FALLON,

Attorney for Petitioner. [18]

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service at the Port of San Francisco, and has been specially directed to appear for and represent the respondent Edward White, Commissioner of Immigration, in the within-entitled matter; that he is familiar with all the facts set forth in the within return to the writ of habeas corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that of affiant's own knowledge the matters set forth in the return to the writ of habeas corpus are true, excepting those matters which are stated on



information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 8 day of November, 1915.

[Seal]

C. W. CALBREATH,  
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Nov. 8, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [19]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 12th day of November, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas Corpus.

**Order Discharging Wong Quen Luck from Custody.**

This matter came on regularly this day for hearing of the writ of habeas corpus heretofore issued herein. The detained was present in court in custody and with his attorney J. P. Fallon, Esq., and C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent, and presented part of the original Immigration Records

as to detained herein. Thereupon, the Court ordered that said Records be filed and marked Respondent's Exhibit "B," and that the same be considered as a part of the original petition herein. Mr. Fallon then called the detained Wong Quen Luck, who was duly sworn and examined in his own behalf, through Chinese Interpreter D. D. Jones, Esq. After hearing Mr. Ornbaun and Mr. Fallon, the Court ordered said matter submitted, and after due deliberation had thereon, ordered that the detained herein Wong Quen Luck be, and he is hereby, discharged from further custody and that he go hence without day. Thereupon Mr. Ornbaun, on behalf of respondent, duly entered an exception to said order. [20]

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*In the District Court of the United States, Northern  
District of California.*

No. 15,895.

In the Matter of WONG QUEN LUCK, on Habeas  
Corpus.

**Order of Discharge.**

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been had thereon, it is by the Court now here ordered, that the said named person in whose behalf the writ of habeas corpus herein was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he

has been produced, and that he go hence without day.

Entered this 12th day of November, 1915.

[Seal]

W. B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

[Endorsed]: Filed Nov. 12, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

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*In the District Court of the United States, in and for  
the Northern District of California, First Divi-  
sion.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on be-  
half of WONG QUEN LUCK.

**Petition for Appeal.**

To the Honorable M. T. DOOLING, Judge of the  
District Court of the United States, for the  
Northern District of California:

Edward White, as Commissioner of Immigration,  
at the Port of San Francisco, appellant herein, feel-  
ing aggrieved by the order and judgment made and  
entered in the above-entitled cause, on the 12th day  
of November, A. D. 1915, discharging Wong Quen  
Luck from the custody of said appellant, does  
hereby appeal from said order and judgment to the  
United States Circuit Court of Appeals for the  
Ninth Circuit, for the reasons set forth in the as-  
signment of errors filed herewith.

WHEREFORE, petitioner prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents, and all of the papers upon which said order and judgment were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of said court and in accordance with the law in such case made and provided.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

Service of the within by copy admitted this — day of —, 19—.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

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*In the District Court of the United States, in and for the Northern District of California, First Division.*

No. 15,895.

In the Matter of the Application of WONG HONG for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

**Assignment of Errors.**

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, respondent



in the above-entitled case, and appellant in the appeal to the United States Circuit Court of Appeals taken herein, by his attorneys John W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, and files the following assignment of errors upon which he will rely in the prosecution of his appeal in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit from an order and judgment made by this Honorable Court on the 12th day of November, A. D. 1915:

I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Wong Quen Luck, from the custody of Edward White, the said Commissioner of Immigration.

II.

That the Court erred in holding that it had jurisdiction to issue a writ of habeas corpus in the above-entitled cause, as prayed for in the said petition for a writ of habeas corpus.

III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in finding that the evidence upon which [23] the Secretary of Labor issued the warrant of deportation for the said Wong Quen Luck was insufficient to justify deportation of the said Wong Quen Luck.

## V.

That the Court erred in holding that the evidence as presented in the said petition for a writ of habeas corpus and the return thereto, together with all of the exhibits on file in the above-entitled cause, was insufficient to justify deportation and in permitting the said Wong Quen Luck to appear before this Court and give testimony in which the said Wong Quen Luck endeavored to explain the discrepancies which appeared in the testimony given by him and his alleged father upon the hearing had before the immigration officers at Angel Island, upon the application of the said Wong Quen Luck to enter the United States.

## VI.

That the Court erred in discharging the said Wong Quen Luck from the custody of the said Edward White, Commissioner of Immigration, after hearing the testimony of the said Wong Quen Luck, as given before the said Court on November 12, 1915.

WHEREFORE, the said Edward White, appellant herein, prays that the said order and judgment of the United States District Court, in and for the Northern District of California made herein, in the office of the clerk of the said court, on the 12th day of November, A. D. 1915, setting aside the return to the petition for writ of habeas corpus, and discharging the said Wong Quen Luck from the custody of Edward White, Commissioner of Immigration, be reversed, and that the said Wong Quen Luck be *remained* to the custody of the said Commissioner of Immigration.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney. [24]

Service of the within by copy admitted this —  
day of —, 19—.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

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*In the District Court of the United States, in and for  
the Northern District of California, First Divi-  
sion.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on be-  
half of WONG QUEN LUCK.

**Order Allowing Appeal.**

On motion of John W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, attorneys for Edward White, Commissioner of Immigration at the Port of San Francisco, and petitioner in the above-entitled cause, it is hereby ordered that an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from an order and judgment heretofore made and entered herein, discharging the said Wong Quen Luck from the custody of the said Edward White, Commissioner of Immigration, at the Port of San

Francisco, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.

Dated this 11th day of May A. D. 1916.

M. T. DOOLING,

Judge of the District Court.

Service of the within by copy admitted this —— day of ——, 19——.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [26]

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*In the District Court of the United States, in and for the Northern District of California, First Division.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

**Notice of Appeal.**

To the Clerk of the Above-entitled Court, and to Wong Quen Luck, and to Joseph P. Fallon, His Attorney.

You and each of you will please take notice that Edward White, Commissioner of Immigration, at the Port of San Francisco, appellant herein, hereby appeals to the United States Circuit Court of Ap-



peals for the Ninth Circuit, from an order and judgment made and entered herein on the 12th day of November, A. D. 1915, setting aside the return to the petition for a writ of habeas corpus and discharging the said Wong Quen Luck from the custody of the said Edward White, Commissioner of Immigration at the Port of San Francisco, and appellant herein.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

Service of the within by copy admitted this — day of —, 19—.

JOSEPH P. FALLON,

Attorney for Appellee.

[Endorsed]: Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

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*In the District Court of the United States, in and for the Northern District of California, First Division.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

**Stipulation Re Respondent's Exhibits "A"  
and "B."**

It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause,

that the original record of the Bureau of Immigration, which was filed in the above-entitled Court, as Respondent's Exhibits "A" and "B," and which were made a part of respondent's return to the petition for writ of habeas corpus in said cause, may be transferred in their original form and without being transcribed, to the United States Circuit Court of Appeals for the Ninth Circuit, and the same is and may there be considered a part of respondent's return to the said petition for writ of habeas corpus, and the record, in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of said respective parties.

Dated this 10th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

JOSEPH P. FALLON,

Attorney for Wong Quen Luck. [28]

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*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on behalf of WONG QUEN LUCK.

**Order Directing Transmission of Original Exhibits  
to Appellate Court.**

It appearing to the Court that it is both necessary and proper that the original papers and records referred to in the above-entitled stipulation should be inspected in the United States Circuit Court of Appeals, for the Ninth Circuit, in determining the appeal of said cause, the same having been made and considered a part of the respondent's return to the petition for writ of habeas corpus,—

IT IS HEREBY ORDERED that the said original record be transferred by the clerk of said court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be retained by said clerk until the appeal in the said above-entitled cause is properly disposed of, at which time the original papers and records are to be returned to the clerk of the above-entitled court.

M. T. DOOLING,

Judge of the District Court.

Dated this 13 day of May, A. D. 1916.

[Endorsed]: Filed May 13, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [29]

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*In the District Court of the United States, in and for  
the Northern District of California, First Di-  
vision.*

No. 15,895.

In the Matter of the Application of WONG HONG  
for a Writ of Habeas Corpus for and on be-  
half of WONG QUEN LUCK.

**Stipulation (As to Certain Discrepancies in the  
Testimony).**

The Court having determined that the hearing before the immigration officers upon the application of Wong Quen Luck to enter the United States was unfair, proceeded to hear and determine such application and

IT IS HEREBY STIPULATED AND AGREED, by and between the respective parties in the above-entitled cause, that the facts appearing before said Court on the 12th day of November, A. D. 1915, at which the said Court permitted the said Wong Quen Luck, on hearing on the return to writ of habeas corpus, to take the stand and explain certain discrepancies in his testimony and the testimony of his alleged father, are as follows:

The detained, Wong Quen Luck, contended that the discrepancies which appeared in his testimony and the testimony of his father at the hearing had before the immigration officials, and upon which he was not permitted to enter the United States, was due to the fact that the official interpreter, who acted for the immigration officials at the time that the testimony of the said applicant was taken, spoke a different dialect from that spoken by the said detained, and because of the fact that the said official interpreter spoke a dialect which was not understood by the detained, the hearing granted him upon his application to enter the United States was unfair.



Upon the foregoing statement, the Honorable M. T. Dooling, Judge of the above-entitled court, permitted said detained to take the stand, and the answers of the said detained to the various questions propounded to him by his counsel and the United States Attorney's office, through the official Chinese Court Interpreter, namely: D. D. Jones, explained the discrepancies satisfactorily to the Court, and the said detained was ordered released.

Dated this 17th day of May, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUN,

Asst. United States Attorney.

JOSEPH P. FALLON,

Attorney for Wong Quen Luck.

[Endorsed]: Filed May 18, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [31]

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*In the District Court of the United States, for the Northern District of California, First Division.*

**Certificate of Clerk U. S. District Court, as to Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 31 pages, numbered from 1 to 31, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Wong Quen Luck, on Habeas Corpus, No. 15,895, as the same now remain on file and of record in the office of the clerk of

said court; said transcript having been prepared pursuant to and in accordance with the "Praeceptum" (copy of which is embodied in this transcript), and the instructions of the attorney for respondent and appellant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of Thirteen Dollars and Eighty Cents (\$13.80).

Annexed hereto is the Original Citation on Appeal issued herein, page 33.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of June, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By T. L. Baldwin,

Deputy Clerk.

CMT. [32]

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### **Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Wong Quen Luck, and Joseph P. Fallon, His Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern

District of California wherein Edward White, Commissioner of Immigration at the Port of San Francisco, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 11th day of May, A. D. 1916.

M. T. DOOLING,

United States District Judge. [33]

United States of America,—ss.

On this 12th day of May, in the year of our Lord one thousand nine hundred and sixteen, personally appeared before me, Joseph E. Connolly, the subscriber, and makes oath that he delivered a true copy of the within citation to Joseph Fallon, the attorney for the appellee, on the 11th day of May, 1916.

JOSEPH E. CONNOLLY.

Subscribed and sworn to before me at San Francisco, this 11th day of May, A. D. 1916.

[Seal]

C. W. CALBREATH.

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 15,895. United States District Court for the Northern District of California, Edward White, Appellant, vs. Wong Quen Luck. Citation on Appeal. Filed May 11, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 2810. United States Circuit Court of Appeals for the Ninth Circuit. Edward White, Commissioner of Immigration at the Port of San Francisco, Appellant, vs. Wong Quen Luck, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed June 9, 1916.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



No. 2810

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, Commissioner of Immigration at the Port of San Francisco,

*Appellant,*

vs.

WONG QUEN LUCK,

*Appellee.*

## GOVERNMENT'S BRIEF

Upon Appeal from the United States District Court for the Northern District of California, First Division.

JOHN W. PRESTON,  
United States Attorney,

CASPER A. ORNBAUN,  
Asst. United States Attorney,  
*Attorneys for Appellant.*

Filed this.....day of February, 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.



No. 2810

IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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EDWARD WHITE, Commissioner of Immigration at the Port of San Francisco,

*Appellant,*

vs.

WONG QUEN LUCK,

*Appellee.*

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**GOVERNMENT'S BRIEF**

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**Statement of Facts**

The appellee, Wong Quen Luck, claims to be the son of Wong Shoon Jung, who is a citizen of the United States. Appellee is sixteen years of age, came to the United States from China on the Steamship "Korea," June 21, 1915, and made an application to enter the United States as a son of a citizen. After a careful hearing of said application, the Secretary of Labor held that the "relationship claimed" was not established and deportation was ordered.

## Specification of Errors

### I.

That the Court erred in granting the writ of habeas corpus and discharging the alien, Wong Quen Luck, from the custody of Edward White, the said Commissioner of Immigration.

### II.

That the Court erred in holding that it had jurisdiction to issue a writ of habeas corpus in the above entitled cause, as prayed for in the said petition.

### III.

That the Court erred in holding that the allegations contained in said petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of the writ of habeas corpus.

### IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Wong Quen Luck was insufficient to justify deportation of the said Wong Quen Luck.

### V.

That the Court erred in holding that the evidence as presented in said petition for a writ of habeas corpus and the return thereto, together with all of the exhibits on file in the above entitled cause, was



insufficient to justify deportation and in permitting said Wong Quen Luck to appear before the Court and give testimony in which the said Wong Quen Luck endeavored to explain the discrepancies which appeared in the testimony given by him and his alleged father upon the hearing had before the Immigration officers at Angel Island.

\*       \*       \*       \*

Although there are several specifications of errors, they all relate to practically the same question, and in fact, there seems to be one material question to be determined in this case, and that is whether the Court erred in holding that the facts presented in the Government's return (which included all of the evidence upon which the order of deportation was based) justified the said Court in finding that the conclusions, orders made, and proceedings had, were manifestly unfair, or that the action taken by the Immigration officers was such as to prevent a fair investigation, or that there was a manifest abuse of discretion on the part of said Immigration officials.

It was necessary for the lower Court to find that there was unfairness or an abuse of discretion on the part of the Immigration officials before it permitted said appellee to attack the proceedings of the Immigration officials.

*Low Wah Suey vs. Backus*, 225 U. S. 460.

In this case Justice Day said:

“A series of decisions in this Court has settled that such hearings before executive officers may

be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final.

*U. S. vs. Ju Toy*, 198 U. S. 253, 49 L. Ed. 1040, 25 Sup. Ct. Rep. 644;

*Chin Yow vs. U. S.*, 208 U. S. 8, 52 L. Ed. 369, 28 Sup. Ct. Rep. 201;

*Tang Tun vs. Edsell*, 223 U. S. 673."

The burden of proof lies upon appellee to show that he was denied a fair opportunity to produce the evidence that he desired to produce or that a fair hearing was denied him by the Immigration officials before the lower Court has jurisdiction.

*Chin Low vs. U. S.*, 208 U. S. 8.

In this case Justice Holmes said:

"Of course if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned (referring to the allegations set forth in the petition for a writ of habeas corpus). If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair, though summary hearing, the case can proceed no further. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case,

whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But supposing that it could be shown to the satisfaction of the district judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied."

From this case it can readily be seen that the lower Court would have no jurisdiction over this case unless it can first be shown that the appellee was not given a fair hearing.

This case did not differ from the ordinary case, and the hearings were conducted in a fair and impartial manner. In fact, an exhaustive examination was made by the Immigration officials to ascertain whether the relationship of father and son existed. Appellee's petition (p. 5 Trans.) shows that "the said Commissioner granted and permitted new and further testimony to be submitted by said detained in support of said application for his admission to the United States."

There is an allegation on page 5 of the transcript as follows:

"That, thereafter, as your petitioner is informed and believes, and therefore alleges the fact to be, the inspector who took said testi-

mony under the direction of said Commissioner, strongly recommended that the said Wong Quen Luck be admitted to the United States, and that he be permitted to reside therein, and that the said application for admission be granted, and said petitioner alleges upon information and belief that the said recommendations were so made for the reason that the said testimony so submitted clearly established the right of said detained person to enter the United States and reside therein."

Had counsel been properly informed concerning the facts of this case, he certainly would not have made such an allegation, for there was no such report in the record.

The only reports made show material discrepancies and contain no such recommendation referred to by said petitioner. The reports are as follows:

On pages 19 and 20 of the record of the Bureau of Immigration, which is an exhibit in this case, Immigrant Inspector Harry B. Blee made the following report:

100/164                      "Office of Immigrant Inspector  
                                 Port of San Bernardino, Cal.,  
                                 July 2, 1915.

Inspector in Charge,  
Immigration Service,  
Los Angeles, Cal.

Inclosed herewith find record of investigation, in quintuplicate, in the case of Wong Quen Luck, alleged son of Wong Shoon Jung, an alleged native. Wong Quen Luck arrived on S. S. Korea, June 21, 1915, at San Francisco, the San Francisco file being 14438/6-20, your



file 5551/96. Copy of habeas corpus proceedings in the case of the alleged father Wong Shoon Jung, is transmitted for use in the case, said copy bearing the No. 7580. Same should be returned when it has served its purpose. The attention of the San Francisco office should be invited to the fact that the alleged father in this case and the identifying witness Wong Ben Jew both gave testimony, which has a bearing on this case, in the case of Wong Ho Lung ex S. S. Siberia, Nov. 9, 1914, who holds certificate of identity No. 17645. San Francisco file No. 13905/19-12 covers the admission of Wong Ho Lung. I hunted up Wong Ho Lung and took a statement from him regarding the present applicant, though he was not mentioned as a witness in the case.

A number of discrepancies have developed in testimony, perhaps the most noticeable being with regard to the applicant's paternal grandfather whom he states he has never seen. Testimony of both the father and witness Wong Ben Jew is to the effect that the grandfather in question lived in the same house with applicant for years. Applicant states that his father owns no land in China. The father states that he does. Applicant states that Wong Daw Sai who lives in the home village has no boys. Both the father and the identifying witness testify that Wong Daw Sai has a son. Witness Wong Ben Jew says that he has visited applicant's home in China many times; that during the last trip he made to the home village in China he went to Wong Quen Luck's house, which was just across the street from his own. 'Many, many times. I cannot count how many times.' A few other minor discrepancies are also noted.

(Signed) Harry B. Blee,  
Immigrant Inspector."

There was a second and supplemental report made after further testimony was taken, which will be found on page 22 of said Immigration record, and which reads as follows:

“SUPPLEMENTAL REPORT.

Office of the Commissioner,  
14438/6-20 San Francisco, Cal, July 15, 1915.

Commissioner of Immigration,  
Thro' Chinese Insp. in Charge,  
Angel Island, Cal.

*In re* Wong Quen Luck, Son of Native, Riverside, Cal., ex S. S. Korea, June 21, 1915:

Statement of the applicant was taken, and the case was forwarded to Riverside for further investigation; it is now returned to me for final report.

The case contains numerous material discrepancies:

Alleged father states that his father died ST-3-10 in his house in China, and that his father and mother had been living in his house ever since he was married. Applicant states that his paternal grandfather died CR-1; does not know where; that he never saw him, and that his mother told him about his grandfather's death.

Applicant states that the witness, Wong Bing Jew, came to his house and delivered some money in 1909, but he doesn't know how much. The witness states that he never at any time took any money to applicant's house, but that he had visited applicant's house many times. The applicant, however, contradicts the latter statement, saying that the witness only called at his house once. Alleged father states that he never sent any money home by the witness.

Applicant states that his father owns no land in China, while his alleged father states that he owns about two acres of rice land, in three pieces, and that his wife leases this land to other people.

There are other minor discrepancies in the testimony, but the foregoing, in my opinion, are sufficient to warrant denial of the applicant, and I so recommend.

(Signed) W. D. Heitmann,  
WDH/PAM. Immigrant Inspector."

After the said investigation was made and the reports rendered, the Inspector of the law section prepared a memorandum, which is set forth on page 28 of said Immigration record for the use of the Commissioner of Immigration, and which is as follows:

No. 14438/6-20 "Office of the Commissioner  
San Francisco, Cal, August 5, 1915.  
Memorandum for the Commissioner.

*In re* Wong Quen Luck alleged son of merchant, ex S. S. 'Korea,' June 21, 1915.

The American nativity of the alleged father is satisfactorily established, he having been admitted as such at three different times, the second time from the essential trip, ex S. S. 'Gaelic,' May 20, 1899, and the last time No. 102, ex S. S. 'Korea,' October 9, 1909.

The examining inspector reports adversely in this case because of certain discrepancies contained in the testimony. One of said discrepancies, to my mind, is in itself sufficient to warrant denial. It will be noted that applicant remembers his father having been in China some eight or nine years ago, but does not remember

the exact date. The fact that alleged father actually was in China in 1909, and now states that his father died in ST-3 (1911), he having received a letter to that effect from his wife, and further states that his father and mother always lived in the same house ever since he married his wife, clearly shows that he is not the father of the present applicant, who testifies that he never saw his paternal grandfather and does not know where he died, but was told by his mother that he, the paternal grandfather, died in CR-1 (1912). He only changed his statement as to whom he received that information from, after having first stated that his father told him about his paternal grandfather's death and having had his attention called to the fact that he had stated his father had not been in China during the last eight or nine years.

The remaining discrepancies are also more or less serious and also tend to show more clearly that a fraudulent claim has been advanced in this case. As applicant has failed to satisfactorily establish the relationship claimed to his alleged father, denial is recommended in this case.

(Signed) Lauritz Lorenzen,  
LL/LM                      Inspector, Law Section."



Following the said investigation and reports, all of the evidence, reports and proceedings in the case were incorporated into the said Immigration record on file herein and forwarded to the Bureau of Immigration at Washington, D. C., and there a memorandum was prepared for the Secretary of Labor, as follows:

“September 2, 1915.

*In re* appeal of Wong Quen Luck, alleged son of a native.

Memorandum for the Assistant Secretary:

This is the case of a Chinese boy of 16 who seeks admission to his alleged father, a ‘court record’ native. He has been denied because the following material discrepancies appear in his testimony and that of his alleged father and the witness:

1. The alleged father states (pp. 17-18) that his father lived with his (the alleged father’s) family in China from the time of the latter’s marriage until the former died in 1911, only four years ago; also that the paternal grandmother lived with him until her death in 1906. Applicant, however, testifies (p. 6) that he never saw his paternal grandfather, who died in 1912; that his mother told him of his grandfather’s death; and that his paternal grandmother died ‘over ten years ago in our house in China.’ This discrepancy is regarded as particularly serious.

2. Applicant states (p. 6) that the alleged father was last in China ‘eight or nine years ago, I (he) don’t remember the date.’ As a matter of fact, the alleged father last returned from China in 1909, only six years ago, when applicant would have been 10 years of age. He

should remember the visit of the alleged father distinctly under these circumstances.

3. Applicant testifies (p. 5) that alleged father owns no land in China, whereas the alleged father states (pp. 15-16) that he owns two acres in three pieces and that it is rented out by his wife.

4. Applicant states that one of his next-door neighbors has two girls and no boys (p. 5). The alleged father testified (p. 16) that his neighbor has 'two or three girls' and two sons, and the witness states (p. 13) that his neighbor has two or three girls and one son.

There are other discrepancies, some of a similar nature and others of less importance. The principals and witnesses, of course, agree on many points, but the Bureau is of the opinion that the failure to agree on the material matters referred to above arouse so grave a doubt as to the *bona fides* of the case as to justify no action other than exclusion. It is accordingly recommended that the decision of Commissioner Backus be affirmed and deportation directed.

For the Commissioner-General,  
A. Warner Parker,  
Law Officer."

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After a careful consideration of the said memorandum and record, the order of deportation was affirmed by Assistant Secretary Louis F. Post in the following language:

"DEPARTMENT OF LABOR.

54005/52

Sept. 14, 1915.

*In re* Wong Quen Luck.

The conflict between applicant and his father as to applicant's grandfather appears upon the

record too clearly to be accounted for by misapprehension or mistranslation or in any other way than as evidence that the applicant was not a member of his alleged father's household, and therefore (considering the other facts) not his alleged father's son. According to applicant he was a member of the household but had never seen his grandfather, although, according to the alleged father (p. 17) the grandfather had lived in the same house with applicant from the time of the father's marriage until the grandfather's death, when applicant was 10 or 12 years old. Appeal dismissed.

(Signed) Louis F. Post,  
Asst. Secy."

There was not a scratch of testimony in the record that would indicate unfairness or an abuse of discretion on the part of the Immigration officials and in the absence of such a showing, their findings and conclusions are final and conclusive.

*Tang Tun vs. Edsell*, 223 U. S. 673;

*Low Wah Suey vs. Backus*, 225 U. S. 460;

*U. S. vs. Ju Toy*, 198 U. S. 253;

*Chin Yow vs. U. S.*, 208 U. S. 8;

*Zakonaite vs. Wolf*, 226 U. S. 272;

*Healy vs. Backus*, 221 Fed. 358-364.

In this case the said certified record of the Bureau of Immigration was filed and made a part of the petition for the writ of habeas corpus upon the hearing of the demurrer. This record was later incorporated into and made a part of the Govern-

ment's return, so the lower Court had all of the proceedings before it, and the Government contends that these proceedings failed to show unfairness or an abuse of discretion on the part of the Immigration officials.

It is true that appellee *contends* that the discrepancies set out in said Immigration record and upon which the order of deportation was based were "due to the fact that the official interpreter who acted for the Immigration officials at the time that the testimony of said applicant was taken spoke a different dialect from that spoken by said detained," but in answer to this contention the Government calls attention to the fact that no such objection was ever made on the part of appellee during the hearings before the Immigration officials, although said appellee had C. L. Bouve, one of the most learned and eminent Immigration lawyers in the United States, employed. Furthermore, the examination of said appellee, as set out on page 6 of the said Immigration record, shows conclusively that the appellee spoke the See Yip dialect, which was the original dialect of said interpreter.

If the Court were permitted to go beyond the Immigration record and to allow the alien to explain discrepancies, such procedure would result in a serious handicap to the Immigration officials and block our courts with litigation, for the Government cannot conceive of a case where it would not be possible for the alien to give some plausible excuse



for the discrepancies which appeared in the record after such alien had been permitted to see the record and learn what discrepancies appeared therein.

That the courts are not prepared to inquire into the sufficiency of probative facts or consider the reasons for the conclusions reached by the Immigration officials is well settled.

*Lee Lung vs. Patterson*, 186 U. S. 170;

*Healy vs. Backus*, 221 Fed. 358, 365;

*White vs. Gregory*, 213 Fed. 768.

In conclusion the Government takes the position that the record in this case shows that there was ample evidence to justify the order of deportation and that the Court erred in going beyond the record presented by the Immigration officials and permitting the appellee to explain discrepancies which the latter claims were due to the interpreter speaking a different dialect, when, as a matter of fact, the record does not support any such contention.

Respectfully submitted,

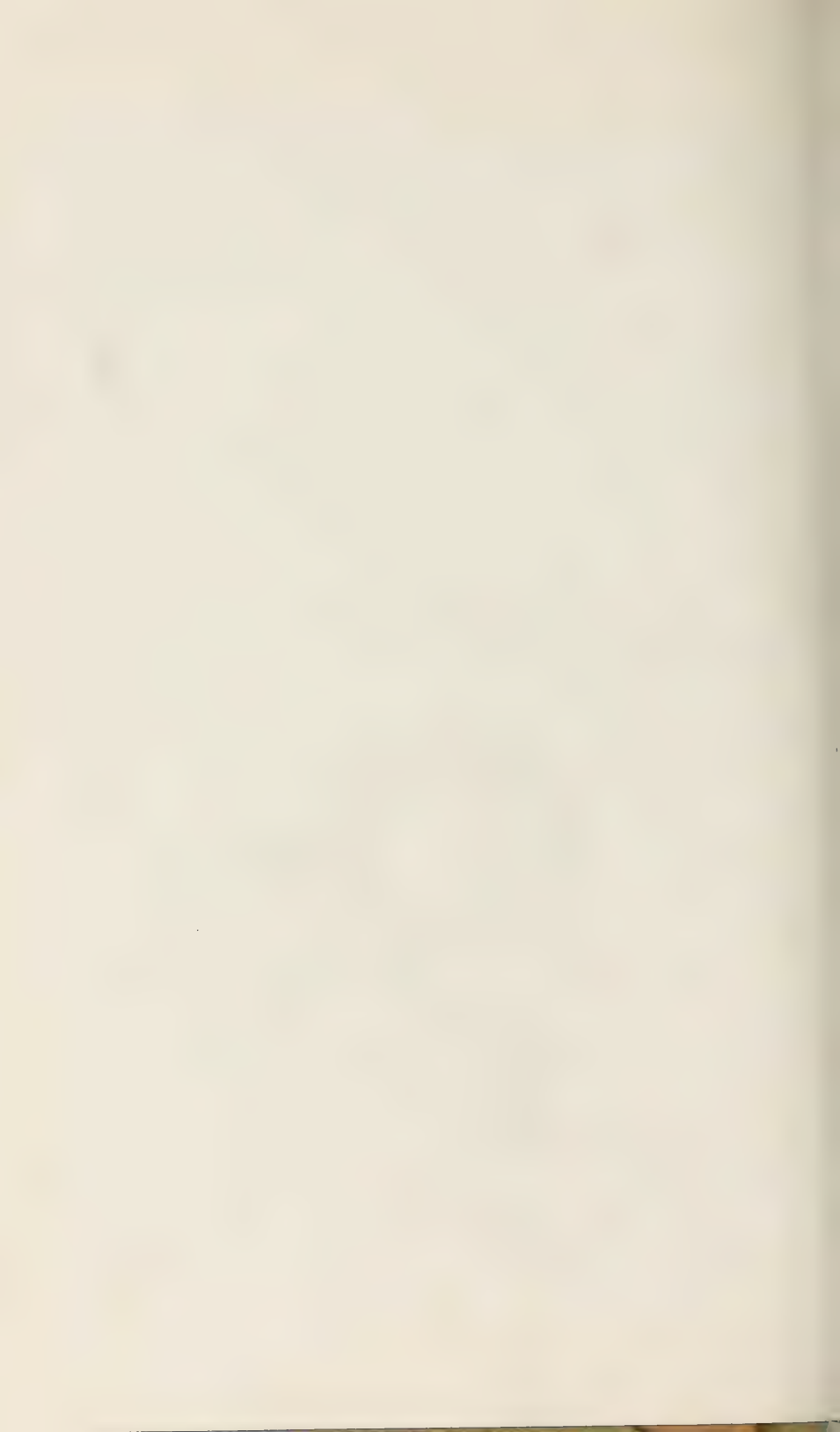
JOHN W. PRESTON,

United States Attorney,

CASPER A. ORNBAUN,

Asst. United States Attorney,

*Attorneys for Appellant.*



No. 2810

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, Commissioner of Immigration  
at the Port of San Francisco,

*Appellant,*

VS.

WONG QUEN LUCK,

*Appellee.*

BRIEF FOR APPELLEE.

Filed

MAR 5 - 1917

F. D. Monckton,  
Clerk.

JOSEPH P. FALLON,  
*Attorney for Appellee.*

*Filed this.....day of March, 1917.*

FRANK D. MONCKTON, *Clerk.*

*By.....Deputy Clerk.*





No. 2810

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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EDWARD WHITE, Commissioner of Immigration  
at the Port of San Francisco,

*Appellant,*

VS.

WONG QUEN LUCK,

*Appellee.*

---

## BRIEF FOR APPELLEE.

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As stated in appellant's brief the appellee, Wong Quen Luck, was born in China, and is the son of a native born citizen of the United States. He made application to be admitted to the United States in the month of June, 1915, in order to join his father, who is a resident of the State of Texas, and was denied the right to land by the Secretary of Labor.

The ground for said denial was based upon certain alleged discrepancies appearing in the testimony offered by the father and the appellee at a hearing held at Angel Island, California, before the immigration officials.

A petition for a writ of habeas corpus was filed in the United States District Court for the Northern District of California, and after a full hearing, the Court ordered his discharge.

The Commissioner of Immigration has appealed from this order on the grounds that the hearing was full and fair before the Department of Labor, and that he nor any other official of the Department of Labor had committed any abuse of discretion or exercised any unfair or arbitrary action in the matter.

In the petition for the writ of habeas corpus, certain allegations are made based upon information and belief to which counsel for appellant, on page "five" of his brief, calls attention, as follows:

"There is an allegation on page 5 of the transcript as follows:

" "That, thereafter, as your petitioner is informed and believes, and therefore alleges the fact to be, the inspector who took said testimony under the direction of said Commissioner, strongly recommended that the said Wong Quen Luck be admitted to the United States, and that he be permitted to reside therein, and that the said application for admission be granted, and said petitioner alleges upon information and belief that the said recommendations were so made for the reason that the said testimony so submitted clearly established the right of said detained person to enter the United States and reside therein.' "

Had counsel been properly informed concerning the facts of this case, he certainly would not have

made such an allegation, for there was no such report in the record”.

In explanation of this allegation, and which explanation was also made to the lower Court at the hearing held therein and not denied, the Department of Labor refused to permit counsel to examine the record for the purpose of ascertaining whether the said detained had good grounds for a writ of habeas corpus and therefore he was left wholly in the dark as to whether the said allegation was true or not.

The appellee was held incommunicado by the immigration officers and no opportunity was given anyone to see him or the record. When he was brought into the presence of the Court under an immigration guard he alleged that the official interpreter who had interrogated him at the hearing before the Department of Labor could not speak his dialect properly and that accounted for the slight and trivial variations in the testimony offered by himself and his father. Both the District Attorney's Office and the Department of Labor were represented at the time the statement was made to the Court and it was agreed that the Court have the detained questioned through the official Court interpreter, D. D. Jones. The District Attorney thereupon put the detained through a rigid cross-examination. No record of this examination was taken for the reason that whilst not explicitly, it was tacitly understood that no appeal would be

prosecuted from the final decision of the Court. This examination so clearly demonstrated that a mistake had been made in the interpretation that the Court ordered the detained's discharge. A stipulation as to the facts was subsequently agreed upon by the counsel for the detained and the District Attorney as follows:

*"In the District Court of the United States,  
in and for the Northern District of  
California, First Division.*

No. 15395

In the Matter of the Application of  
WONG HONG, for a Writ of Habeas  
Corpus for and on behalf of WONG  
QUEN LUCK.

#### STIPULATION.

It is hereby stipulated and agreed, by and between the respective parties in the above entitled cause, that the facts appearing before said court on the 12th day of November, A. D. 1915, at which time the said court permitted the said Wong Quen Luck, on hearing on the return to writ of habeas corpus, to take the stand and explain certain discrepancies in his testimony and the testimony of his alleged father, are as follows:

The detained, Wong Quen Luck, contended that the discrepancies which appeared in his testimony and the testimony of his father at the hearing had before the immigration officials, and upon which he was not permitted to enter the United States, was due to the fact that the official interpreter, who acted for the immigration officials at the time that the testimony of the said applicant was taken spoke a different dialect from that spoken by the said detained, and because of the fact that the said official interpreter spoke a dialect which was



not understood by the detained, the hearing granted him upon his application to enter the United States was unfair.

Upon the foregoing statement, the Honorable M. T. Dooling, judge of the above entitled court, permitted said detained to take the stand, and the answers of the said detained to the various questions propounded to him by his counsel and the United States Attorney's office, through the official Chinese court interpreter, namely, D. D. Jones, explained the discrepancies satisfactorily to the court and the said detained was ordered released.

Dated this 17th day of May, A. D. 1916.

JOHN W. PRESTON,

United States Attorney.

CASPAR A. ORNBAUM,

Assist. United States Att.

JOSEPH P. FALLON,

Attorney for Wong Quen Luck.

(Endorsed): Filed May 18, 1916.

W. B. MALING, Clerk.

By C. W. Calbreath,

Deputy Clerk."

Nowhere does it appear that objection was made to the District Court's taking jurisdiction of the matter and in fact it appeared at the hearing before said Court that all parties concerned seemed anxious that the matter be considered fully to determine whether there was any merit to the charge of mistake and unfairness. That a mistake had been made in the interpretation of the dialect was so clearly demonstrated by the cross-examination of the detained conducted by the District Attorney assisted by the immigration official Inspector, and it so conclusively established the

relationship claimed, that the Court determined that a mistake had been made and ordered the discharge of the detained. Having apparently been anxious to demonstrate in Court the utter absurdity of the claims of the detained, that he had been unfairly treated in the interpretation before the Department of Labor, it is in decidedly bad form for them now to complain after they had been routed and the decision of the Court was against them.

The detained is the son of a citizen of the United States. He was examined without the presence of counsel and held during all the time his case was under consideration both by the Department of Labor and the Court, under close surveillance by the immigration officials, and for a few slight variations in the testimony of his father and himself was denied the right to land in this country. He had no opportunity to disclose the real facts to his counsel as to the mistakes in interpretation, and it was only in open Court that he was permitted so to do.

Counsel for the Government contends that the Court had no right to take jurisdiction of the matter. Our contention is that whether or not the weight of the evidence in substantial conflict at the hearing is a question of fact within the exclusive jurisdiction of the offices of the Department of Labor, nevertheless the question of fraud or mistake is one of which the Courts can take jurisdiction, and are not without power of review. That was not a

fair hearing that permitted an interpreter to be employed that did not speak the same dialect as the detained, and allowed mistakes to be made which resulted in a false finding. The grounds for denial were trivial in the first instance, and there was no substantial evidence to support the charge and finding of the Department of Labor. Where injurious error in deciding a question is made by any executive or quasi-judicial officer or tribunal it is reviewable and remediable by the Courts. *School of Magnetic Healing v. McNulty*, 187 U. S. 94, 108, 23 Sup. Ct. 33; 47 L. Ed. 90. *Interstate Commerce Commission v. Louisville and Nashville R. R. Co.*, 227 U. S. 88, 91, 33 Sup. Ct. 185, 57 L. Ed. 431 and cases cited; *Howe v. Parker*, 190 Fed. 738, 746, 111 C. C. A. 466, 474, and cases there cited.

In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair and subject to judicial review. *Whitfield v. Hanges*, 222 Fed. 745, 751; *McDonald v. Sier Tak Sam*, 225 Fed. 710; *Ex parte Sam Pui*, 217 Fed. 456; *Ex parte Chan Kam*, 232 Fed. 855.

We respectfully urge that the judgment of the District Court be sustained.

Dated, San Francisco,

March 5, 1917.

JOSEPH P. FALLON,  
Attorney for Appellee.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

JOSEPH B. KATZ,

Appellant,

vs.

COMMISSIONER OF IMMIGRATION AT THE  
PORT OF SAN FRANCISCO, CALIFOR-  
NIA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for  
the Northern District of California,  
First Division.

Filed

JUL 10 1916

F. D. Monahan,

Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOSEPH B. KATZ,

Appellant,

vs.

COMMISSIONER OF IMMIGRATION AT THE  
PORT OF SAN FRANCISCO, CALIFOR-  
NIA,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Northern District of California,  
First Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, for the  
Northern District of California, First Division.*

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas Corpus.

**Names and Addresses of Attorneys of Record.**

MARSHALL B. WOODWORTH, Esq., Attorney for  
Appellant and Petitioner.

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UNITED STATES OF AMERICA.

*District Court of the United States, Northern Dis-  
trict of California.*

Clerk's Office.

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas Corpus.

**Praecipe for Transcript of Record.**

To the Clerk of Said Court:

Sir: Please issue certified copy of following papers, pleadings, etc.: (1) Petition for Writ of Habeas Corpus; (2) Order therein; (3) Demurrer; (4) Order Sustaining Demurrer; (5) Notice of Appeal; (6) Petition for Appeal; (7) Order Allowing Appeal; (8) Assignment of Errors; (9) Cost Bond; (10) Stipulation as to Exhibits; Citation; and all minute orders of Court except those of postponements; Praecipe for Appeal.

Also opinions of Court in 15,753 and 15,752, being respectively in Matters of Joseph B. Katz, No. 15,753, and Matter of Harry H. Katz, No. 15,752.

MARSHALL B. WOODWORTH,  
S. LUKE HOWE,

Attorneys for Appellant.

[Endorsed]: Filed Apr. 17, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [1\*]

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*In the District Court of the United States, Northern  
District of California, First Division.*

(No. 15,753.)

In the Matter of JOSEPH KATZ, on Habeas Corpus.

**Petition for Writ of Habeas Corpus.**

To the Honorable, the said District Court of the  
United States, Northern District of California,  
First Division:

The petition of the above named respectfully sets  
forth and states:

(I)

That the petitioner, Joseph Katz, is a resident of Colfax, State and Northern District of California, and has been a regularly domiciled resident of said State and Northern District of California continuously last past for the period of eight years and over; that he first arrived and lawfully entered the United States at the port of New York in the year 1906, with the then intention of permanently remaining

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\*Page-number appearing at foot of page of original certified Record.



and residing in the United States and of becoming a regularly domiciled resident, denizen and inhabitant of the United States, and a citizen thereof, and that he has since continuously resided in the United States, and that during all of said time, since his arrival in the United States, he has been, and now is, a regularly domiciled resident, denizen and inhabitant of the State and Northern District of California, and of the United States of America, and, up to and at the time of the unlawful detention, restraint and imprisonment hereinafter complained of, was lawfully and regularly domiciled and living in Colfax, State and Northern District of California, and had and has no home, abode or [2] domicile elsewhere.

That said petitioner, on or about November 15, 1906, in the city of New York, State of New York, duly and regularly applied for and was granted his first papers as a citizen of the United States, to wit; his declaration of intention to become a citizen of the United States, and that ever since it has been and now is his purpose and aim to be admitted and to become a citizen of the United States of America.

That your petitioner has, since his arrival in the United States, plied his trade as a barber, first in New York, then in San Francisco, then in Palo Alto, then in Sacramento, then and now in Colfax, that he is a hard working, industrious and frugal man who has saved up his money, and that he has made some small investments in buying and selling real estate.

(II)

That your said petitioner is unlawfully im-

prisoned, restrained, confined and detained of his liberty by the Commissioner of Immigration at the port of San Francisco, and is about to be taken from his domicile and abode in the State of California, and from his domicile and abode in the United States of America, and sent against his will to the Kingdom of Great Britain, of which he is not a resident and has not been for very many years, and in which he has no domicile, abode, home or residence.

That the illegality of said imprisonment, detention, confinement and restraint consists in this:

That the said Commissioner of Immigration claims to have the legal right to, and does, hold the said petitioner in imprisonment and detention, and claims the right and is about to deport and banish him from the State of California and from [3] the United States by virtue of and under the authority of a pretended warrant of deportation directing him so to deport and banish him, which said warrant, it is claimed by said Commissioner of Immigration, was issued by the Secretary of Labor under and by virtue of the laws of the United States made and promulgated to regulate and provide for the deportation of certain alien persons, to wit, under the authority of the Immigration Act of February 20, 1907 (34 Stats. 898), as amended by the Act of March 26, 1910 (36 Stats. 263.)

That the said Secretary of Labor and the said Commissioner of Immigration had, and now have, no jurisdiction or lawful authority so to deport or banish the said petitioner from the United States for the following reasons, to wit:

First. That your petitioner is charged, in the warrant of arrest (Exhibit "A") and is ordered deported, upon the charge that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes.

That it is claimed by said Secretary of Labor and said immigration officials that your petitioner is guilty of said charge for the simple and only reason that he is the landlord of the property in Colfax, California, which, at the time of his arrest on said charge, was occupied and used as a house of prostitution, and that he collected a monthly rent from one Nellie White, who had rented said premises from your petitioner, of \$25 per month; that, for these reasons and none other, it is claimed by said Secretary of Labor and said immigration officials that your petitioner, in receiving, in the capacity of landlord and in no other capacity, the monthly rental of \$25 from Nellie White, a prostitute and manager of said house of prostitution, was guilty of having been "found receiving, [4] sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes," as charged in said warrant of arrest (Exhibit "A.")

In this behalf, your petitioner alleges that at all times during his ownership of said property, so rented from him by said Nellie White and conducted as a house of prostitution, he occupied simply and only the capacity and function of a landlord, and that Nellie White occupied the capacity and function of his tenant; that he received from Nellie White, as his tenant, the monthly rental of \$25 in

payment solely and exclusively for the rent of said premises, consisting of the land and a house containing several rooms; that said monthly rental of \$25 was a reasonable rent for such a house in that particular locality; that at no time or place was it ever understood or agreed by and between your petitioner, as landlord, and said Nellie White, as his tenant, that said monthly rental of \$25 was anything more or less than for the rental of said premises or that said \$25 monthly rental was, or should be, made up, in part or in whole, out of the earnings of any prostitute, or prostitutes.

In this regard, your petitioner alleges that at no time has he ever "been found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes," as charged in said warrant of arrest. (See Exhibit "A.")

Your petitioner further alleges, that he never had, at any time, any, the slightest, interest in the management of said house of prostitution so conducted as aforesaid by said Nellie White as his tenant, or in any of the profits or earnings of said Nellie White or of any woman practicing prostitution on said premises, of which he *has* solely and exclusively the [5] landlord, and that he has never received, or shared in, or derived any benefit whatsoever from the earnings of a prostitute, or prostitutes, anywheres and at any time.

Your petitioner further alleges that at the time of his arrest and at all of the times of the alleged existence of the charge made against him in and by



said warrant of arrest he was, and he alone was, the sole and exclusive owner and landlord of said premises so rented from him by said Nellie White, and that neither his brother, Harry Katz, or any other person whatsoever, ever had, or now has, any interest whatsoever in said premises, or the land and improvements situated thereon.

Second. That your petitioner did not have any legal hearing upon the charge made against him in the warrant of arrest issued against him dated February 26, 1914, a copy of which warrant of arrest is appended hereto, marked Exhibit "A" and made a part hereof.

Third. That this petitioner is not amenable to any of the provisions of the Act of February 20, 1907, as amended by the Act of March 26, 1910, in that there was and is no sufficient, legal, or competent, or any, evidence, showing that he "is unlawfully within the United States in that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes," as charged in said warrant of arrest. (See Exhibit "A.")

Fourth. That there was and is no sufficient, or any, warrant of deportation authorizing the Commissioner of Immigration, at Angel Island, California, in whose custody, confinement, restraint and imprisonment this petitioner now is, to deport this petitioner from the port of San Francisco to a foreign country or elsewhere, or to hold this petitioner in detention and imprisonment for any purpose whatsoever. [6]

Fifth. That this petitioner was and is ordered deported without any due process of law, or proof of any kind or character proving, or tending to prove said alleged charge made against him.

(III)

This petitioner further alleges that, before any pretended warrant of deportation was issued against him as aforesaid, the said petitioner was denied by the said Secretary of Labor and by the immigration officers at the port of San Francisco that full and fair hearing guaranteed by the law, and, in this behalf, your petitioner alleges as follows:

First. That your petitioner was subjected to private and secret investigations and examinations without his consent and compelled to be a witness against himself without first having been advised and informed of the charges pending against him and of his rights in the matter and of the fact that any statement made by him might, could and would be used against him, and that the consequences of an unfavorable decision would result in his deportation and banishment, and without being allowed or permitted first to be advised by, or have the benefit of, legal counsel.

Second. That the so-called evidence attempted to be presented and introduced against your petitioner, upon which said pretended warrant of deportation is based, consists of statements based on information and belief, contained in affidavits, without any opportunity whatever of cross-examining the persons making said affidavits, or without any notice whatever to said petitioner, or to his attorneys, or any of

them, that said persons were about to, or would, swear to said affidavits, and consists, further, of *ex parte* and hearsay statements, matters of opinion, conjectures and surmise, private [7] reports and other matter of an incompetent, immaterial and irrelevant character, not permitted to be admitted in the courts of justice of the United States, State or federal, and wholly insufficient to support any of the charges upon which it is sought to deport this petitioner, all of which will more fully appear by reference to a copy of the proceedings before said Commissioner of Immigration and the Secretary of Labor, made a part hereof and marked Exhibits "A" to —.

Third. Your petitioner further alleges that the said immigration officers further acted in bad faith and arbitrarily and illegally in said pretended trial, or hearings, in not producing any witnesses or evidence to support the truth of the charges alleges against this petitioner, and in acting wholly and entirely and solely upon statements based on information and belief, contained in affidavits, without any opportunity whatever of cross-examining the persons making said affidavits, or without any notice whatever to said petitioner, or to his attorneys, or any of them, that said persons were about to, or would, swear to said affidavits, and in acting wholly and entirely and solely upon *ex parte* affidavits without an opportunity for cross-examination, and in denying the right of cross-examination as to all of the persons whose affidavits were presented against this petitioner, and in acting upon hearsay state-

ments and private reports, matters of opinion, conjecture and surmise, and other matter of an incompetent, immaterial and irrelevant character, not permitted to be admitted in the courts of justice of the United States, State or federal, and wholly insufficient to support any of the charges upon which it is sought to deport this petitioner, all of which will more fully appear by reference to a copy of [8] the proceedings herein above referred to, attached to this petition and made a part hereof.

(IV)

That said petitioner was denied the right of an appeal from the decision of the Secretary of Commerce and Labor, and that the only hearing allowed him was the hearing before the Secretary of Commerce and Labor, at which the warrant of deportation was issued, at which hearing this petitioner was not present and did not have any notice thereof, the other hearings, if any, at Angel Island, California, before the Commissioner of Immigration, being merely in the nature of private detective investigations against this petitioner and of secret examinations of this petitioner without his consent and at times without his presence and without being represented by legal counsel at all stages of the proceedings or even being permitted first to obtain legal advice or being warned or advised as to his rights in the matter or at all.

(V)

That said pretended hearing before said Commissioner of Immigration did not, and does not, constitute a full and fair, or full or fair, hearing within



the meaning of the law, in that this petitioner was not permitted, nor were any of his counsel, to see or peruse or obtain a copy of the recommendations of the examining officer and the officer in charge as contemplated by paragraph c. of subd. 4 of Rule 22 of the rules relating to arrest and deportation on warrant, promulgated by the Department of Commerce and Labor, Bureau of Immigration and Naturalization, on November 15, 1911, First Edition; that such practice is not consistent with the eternal principles of right and justice; that this petitioner or its counsel had no opportunity to know what the recommendations of the immigration [9] officials were and, upon what reasons said recommendations, being adverse, were based, had no opportunity to take exceptions thereto or to correct any errors therein, or to combat or refute the same or to protect the rights of this petitioner before the Secretary of Labor when he received said adverse recommendations and considered and acted upon the same and ordered this petitioner deported.

(VI)

That said Secretary of Labor and the immigration officials, in the various particulars above set forth, acted arbitrarily and that their proceedings were and are manifestly unfair, and that the action of such executive officers was and is such as to prevent a fair investigation, and that there was and is a manifest abuse of the discretion committed to such executive officers by statute.

(VII)

This petitioner avers that he has herewith ap-

pendent to this petition and made a part hereof a full, true and correct copy of all of the proceedings before the immigration officials, so far as the same have been disclosed to this petitioner or to his counsel, and of which he is, or his counsel are, aware.

(VIII)

That your petitioner has exhausted all legal or other remedies specified in the Acts of Congress relating to the subject matter.

(IX)

That your petitioner is not an alien or other immigrant; and that he has acquired and now holds a fixed, permanent residence and domicile in the city of Colfax, State and Northern District of California, and has enjoyed and maintained his residence and domicile in the United States for [10] many years continuously last past without molestation or interference until the time of your petitioner's arrest and threatened deportation as aforesaid.

(X)

That your petitioner is now detained, imprisoned, confined and restrained of his liberty and is imprisoned at said Angel Island, California, and is held and imprisoned by the order and direction of the Secretary of Labor, and is in the custody of the Commissioner of Immigration at the port of San Francisco, California, who claims the right to deport this petitioner under and by virtue of the pretended warrant of deportation hereinabove referred to.

That said Commissioner of Immigration threatens to take, carry away and deport this petitioner to

some foreign country forthwith, and will so deport this petitioner unless stayed by the writ of this Court or the order and direction of this Court.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue out of this Honorable Court, and that he be brought before this Court then and there to inquire into the cause of his said imprisonment and threatened deportation; that in the meantime, all proceedings against him be stayed, and that he be not taken without the jurisdiction of this Court during the pendency of these proceedings and that your petitioner be admitted to bail in such sum as to this Court may seem meet and proper; and that said immigration officers be required to make a full and complete return showing the cause of the detention of your petitioner; and, finally, that your petitioner be restored to his liberty and permitted to go [11] hence without day.

J. B. KATZ,  
Petitioner.

State of California,  
City and County of San Francisco,  
Northern District of California,—ss.

Joseph B. Katz, being first duly sworn, deposes and says: That he has read the foregoing petition for a Writ of Habeas Corpus and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are stated on information and belief, and, as to those matters, that he believes them to be true.

J. B. KATZ.

Subscribed and sworn to before me this 16th day of December, 1914.

[Seal]

MARTIN ARONSOHN,

Notary Public in and for the City and County of San Francisco, State of California. [12]

**Epitome and Index of Exhibits.**

Exhibit	“A”—Warrant of arrest.....	p. 1
Exhibit	“B”—Certificate of admission of alien .....	p. 2
Exhibit	“C”—Application for warrant of arrest.....	p. 3
Exhibit	“D”—Affidavit of Emma Mc- Mullen in support ap- plication for warrant..	p. 4
Exhibit	“E”—Affidavit of Mary Han- son in support applica- tion for warrant.....	p. 5
Exhibit	“F”—Affidavit of Martha S. Beaser in support ap- plication for warrant..	p. 6
Exhibit	“G”—Affidavit of Francis E. West in support ap- plication for warrant..	p. 7
Exhibit	“H”—Affidavit of Mame L. Schoonover in sup- port application for warrant .....	p. 8
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- Exhibit "S"—Affidavit of Martha S. Beaser in support of application for warrant for Nellie White. . . . . p. 19
- Exhibit "T"—Affidavit of Mary Pearl Pottol in support of application for warrant for Nellie White. . . . p. 20
- Exhibit "U"—Affidavit of Jeannie Kendall Lobner in support of application for warrant for Nellie White. p. 21
- Exhibit "V"—Affidavit of Grant McMullen in support of application for warrant for Nellie White. p. 22
- Exhibit "W"—Preliminary and secret examination of petitioner Joseph Katz. . . p. 23-27
- Exhibit "X"—First hearing—May 8, 1914 . . . . . p. 28-29
- Exhibit "Y"—Affidavit of W. H. Thomas on behalf of petitioner . . . . . p. 30
- Exhibit "Z"—Affidavit of W. P. Hess on behalf of petitioner. p. 31
- Exhibit "AA"—Affidavit of James Keane on behalf of petitioner. p. 32
- Exhibit "BB"—Affidavit of J. M. Newman on behalf of petitioner. . . . . p. 33

- Exhibit "CC"—Affidavit of J. R. Dirnin  
on behalf of petitioner. p. 34
- Exhibit "DD"—Affidavit of O. C. Gillin  
on behalf of petitioner. p. 35
- Exhibit "EE"—Affidavit of Fred Mar-  
vin on behalf of peti-  
tioner . . . . . p. 36
- Exhibit "FF"—Affidavit of Henry Lob-  
ner on behalf of peti-  
tioner . . . . . p. 37
- Exhibit "GG"—Supplementary affidavit  
of Joseph Katz, dated  
April 2, 1914. . . . . p. 38
- Exhibit "HH"—Copy report of D. J. Grif-  
fiths, Immigrant In-  
specter, dated July 23,  
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- Exhibit "II"—Affidavit of Joseph Katz,  
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dated August —, 1914. p. 42
- Exhibit "KK"—Affidavit of Geo. Meister  
on behalf of Joseph B.  
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- Exhibit "LL"—Telegraphic order depor-  
tation, dated December  
2, 1914. . . . . p. 44
- Exhibit "MM"—Brief on behalf of Joseph  
Katz, May 8, 1914. . . . . p. 45-47
- Exhibit "NN"—Brief on behalf of Joseph  
Katz and H. H. Katz,  
dated Sept. 1, 1914. . . . . p. 48-50

NOTE: For copies of further proceedings and papers as against Joseph Katz we beg to refer and make part hereof to copies of proceedings and papers attached to petition for writ of habeas corpus on behalf of Harry Katz (this day filed in this court), and marked Exhibits "CCC" to and including Exhibits "VVV." [14]

[Endorsed]: Filed Dec. 16, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

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*In the District Court of the United States, Northern  
District of California, First Division.*

In the Matter of JOSEPH KATZ, on Habeas Corpus.

**Order to Show Cause.**

Upon reading the petition on file herein and good cause appearing therefor, it is ordered that the respondent, the Commissioner of Immigration at the port of San Francisco, California, appear in this court on the 24th day of December, 1914, at 10 o'clock A. M., and then and there show cause, if any, why the writ of habeas corpus should not issue as prayed for and that during the pendency of these proceedings the petitioner be not removed from the jurisdiction of this Court, and that a copy of this order and of said petition be served upon respondent forthwith and that the petitioner be admitted to bail in the sum of one thousand dollars.

Dated December 16, 1914.

M. T. DOOLING,  
U. S. District Judge.



[Endorsed]: Filed Dec. 16, 1914. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [16]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 16th day of December, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, District Judge.

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas Corpus.

**Minutes—Order to Show Cause.**

In this matter M. B. Woodworth, Esq., presented to the Court the petition of Joseph B. Katz for a writ of habeas corpus for and on his own behalf. After considering said petition, the Court ordered that the respondent, the Commissioner of Immigration at the port of San Francisco, do appear, and show cause on December 24th, 1914, at 10 o'clock A. M., why a writ of habeas corpus should not issue herein as prayed for in said petition. Further ordered that a copy of this order and copy of said petition be served on said respondent. Further ordered that the detained herein be admitted to bail in the sum of One Thousand Dollars (\$1,000), and upon the giving of such bail he be released from custody accordingly. [17]

*In the District Court of the United States, in and for  
the Northern District of California, First Divi-  
sion.*

In the Matter of JOSEPH KATZ on Habeas Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Now comes the respondent, Samuel W. Backus, Commissioner of Immigration at the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled matter and for grounds of demurrer alleges:

I.

That said petition does not state facts sufficient to entitle the petitioner to the issuance of a writ of habeas corpus or any relief thereon.

II.

That said petition is insufficient in that the statements in the petition relative to the record of the testimony taken on the trial of the applicant are statements of conclusions of law.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,

United States Attorney.

WALTER E. HETTMAN,

Asst. United States Attorney,

Attorneys for Respondent.

Service admitted this 5th day of January, 1915.

MARSHALL B. WOODWORTH,

Atty. for Pet.

[Endorsed]: Filed Jan. 5, 1915. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [18]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 5th day of February, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable M. T. DOOLING, District Judge.

No. 15,753.

In the Matter of JOSEPH KATZ, on Habeas Corpus.

**Minutes of Hearing on Order to Show Cause.**

This matter came on regularly for hearing on the order to show cause why writ of habeas corpus should not issue as prayed for in the petition filed herein and the demurrer thereto filed by respondent. After hearing W. E. Hettman, Esq., Assistant United States Attorney, on behalf of respondent, and M. B. Woodworth, Esq., on behalf of petitioner and detained, the Court ordered said matter submitted and petitioner to have ten days to file points and authorities. [19]

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas  
Corpus.

**Order Sustaining Demurrer to Petition and Denying  
Petition for a Writ of Habeas Corpus.**

MARSHALL B. WOODWORTH and S. LUKE  
HOWE, Attorneys for Petitioner.

JOHN W. PRESTON, United States Attorney,  
and CASPAR A. ORNBAUN, Assistant  
United States Attorney, Attorneys for Re-  
spondent.

**ON DEMURRER TO PETITION FOR WRIT OF  
HABEAS CORPUS.**

The record here shows that Joseph B. Katz was the owner of the house in Colfax; that the same was a house of prostitution; that he knew it, and that he received rent for the house from Nellie White, one of the inmates. I think this brings him within the terms of the statute as deriving "benefit from the earnings of a prostitute."

The demurrer to the petition will therefore be sustained, and the application for a writ denied.

November 26th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Nov. 26, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [20]



At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 26th day of November, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas Corpus.

**Minutes—Order Sustaining Demurrer to Petition,  
and Denying Petition for Writ.**

In this matter the Court this day ordered that the demurrer to the petition for a writ of habeas corpus herein, heretofore argued and submitted, be, and the same is hereby, sustained, and the petition for such writ denied accordingly. [21]

*In the District Court of the United States, in and for  
the Northern District of California, First Division.*

No. 15,752.

In the Matter of HARRY KATZ, on Habeas Corpus.

**Opinion and Order Overruling Demurrer, and  
Granting Writ.**

**ON DEMURRER TO PETITION FOR A WRIT  
OF HABEAS CORPUS.**

MARSHALL B. WOODWORTH and S. LUKE  
HOWE, Attorneys for Petitioner.

JOHN W. PRESTON, United States Attorney  
and CASPAR A. ORNBAUN, Assistant  
United States Attorney, Attorneys for Re-  
spondent.

The records here which accompany the petition show no real evidence against the petitioner. The affidavits are upon information and belief, and express only the opinions of the affiants. It is true that in this State the reputation of a house as a house of ill-fame, may be shown, but I know of no rule, here or elsewhere, which permits the ownership or management of such a house to be thus proved. There should be, in my opinion, some fair, substantial testimony upon which to base an order deporting from this country an alien who has lawfully entered it. The record here is too long to recite, but the closest scrutiny of it will not reveal in all the testimony taken, whether in the presence or absence

of petitioner, and competent evidence, and by that I mean evidence other than pure hearsay and expressions of opinion, tending to support the finding that petitioner was either connected with the [22] management of a house of prostitution or has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes. It may be true that the presence of petitioner in this country is displeasing to many worthy people, but he may not be deported for that reason. He can only be deported after a fair hearing, and then only when the order deporting him finds support in something other than mere hearsay and opinion. The demurrer to the petition will be overruled, and a writ will issue returnable December 11th, 1915, at 10 o'clock A. M.

November 26th, 1915.

M. T. DOOLING,  
Judge.

[Endorsed]: Filed Nov. 26, 1915. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [23]

*In the District Court of the United States, in and for  
the Northern District of California, First Di-  
vision.*

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas  
Corpus.

**Notice of Appeal.**

To Hon. JOHN W. PRESTON, United States Attor-  
ney, and Hon. CASPAR A. ORNBAUN, Assis-  
tant United States Attorney, Attorneys for Re-  
spondent:

Gentlemen:

You, and each of you, will please take notice that the petitioner in the above-entitled matter, Joseph B. Katz, through his attorneys, Marshall B. Woodworth and S. Luke Howe, feeling himself aggrieved by the judgment of the above-entitled court rendered on November 26, 1915, sustaining the demurrer to the petition for a writ of habeas corpus and denying his application for a writ of habeas corpus, hereby appeals from said judgment and decision to the Circuit Court of Appeals for the Ninth Circuit.

San Francisco, Cal., December 7, 1915.

Respectfully,

MARSHALL B. WOODWORTH,  
S. LUKE HOWE,

Attorneys for Petitioner and Appellant.

Received a copy of the within notice of appeal this  
7th day of December, 1915.

JNO. W. PRESTON,  
Attorneys for Respondent.



[Endorsed]: Filed Dec. 7, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [24]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas  
Corpus.

**Petition for Appeal.**

Joseph B. Katz, the petitioner in the above-entitled matter, feeling himself aggrieved by the judgment of the above-entitled Court made and entered herein on November 26, 1915, whereby it was ordered and adjudged that the demurrer to the petition for a writ of habeas corpus be sustained and the application and petition for the *writ* of habeas corpus, denied, now comes through his attorneys and petitions said court for an order allowing him, the said petitioner, to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this court be suspended, stayed and superseded until the final determination of said appeal.

And your petitioner will ever pray etc.

Dated April 17th, 1916.

MARSHALL B. WOODWORTH,  
S. LUKE HOWE,  
Attorneys for said Petitioner.

Service of the within by copy admitted this 17 day of Apr., 1916.

JNO. W. PRESTON,  
Attorney for Respondent.

[Endorsed]: Filed Apr. 17, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [25]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas  
Corpus.

**Assignment of Errors.**

Now comes the petitioner in the above-entitled matter, by Marshall B. Woodworth, Esq., one of his attorneys, and specifies the following errors upon which he will rely and which he will urge upon his appeal in the above-entitled matter, to wit:

I.

That the Court erred in sustaining the demurrer to the petition for a writ of habeas corpus.

II.

That the Court erred in denying the petition for a writ of habeas corpus.

III.

That the Court erred in not granting the petition for a writ of habeas corpus and in not discharging the petitioner.

IV.

The Court erred in holding that the petitioner was

subject to deportation for the reason that he came within the terms of Section 3 of the Act of February 20, 1907 (34 Stat. 898), as amended by the Acts of March 26, 1910 (36 Stat. 263), and March 4, 1913, entitled "An Act to Regulate Immigration of aliens into the United States," providing that any alien should be deported who should "derive benefit from any part of the earnings of any prostitute." [26]

#### V.

The Court in holding that the petitioner was subject to deportation, for the reason that the record showed that the petitioner was the owner of the house in Colfax; that the same was a house of prostitution; that he knew it, and that he received rent for the house from Nellie White, one of the inmates; and that thereby he came within the terms of Section 3 of the Act of February 20, 1907 (34 Stat. 898), as amended by the Acts of March 26, 1910 (36 Stat. 263), and March 4, 1913, entitled "An Act to Regulate Immigration of Aliens into the United States," as deriving "benefit from the earnings of a prostitute."

#### VI.

The Court erred in holding that the petitioner is subject to deportation under Section 3 of the Act of February 20, 1907 (34 Stat. 898), as amended by the Acts of March 26, 1910 (36 Stat. 263), and March 4, 1913, entitled "An Act to Regulate Immigration of Aliens into the United States," simply because, being an alien and owning a piece of property in Colfax, California, and receiving a monthly rental of \$25.00, in the capacity of landlord and in no other

capacity or relation, from Nellie White, who managed and used the house as a house of prostitution and was one of the inmates thereof, the Court considered that he was deriving "benefit from any part of the earnings of any prostitute."

## VII.

The Court erred in holding that aliens, who own real estate within the United States and rent the same merely as landlords and in no other capacity or relation and receive a reasonable rent therefor, having nothing whatsoever to do with the conduct or management of the premises rented, or any interest therein as a house of prostitution, are deemed to be subject to deportation [27] as coming within the terms of Section 3 of the Act of February 20, 1907 (34 Stat. 898), as amended by the Acts of March 26, 1910 (36 Stat. 263), and March 4, 1913, entitled "An Act to Regulate Immigration of Aliens into the United States," providing that any alien should be deported who should "derive benefit from any part of the earnings of any prostitute."

WHEREFORE, for the many manifest errors committed by said Court, the defendant, through his attorneys, prays that said judgment sustaining the demurrer to the petition for a writ of habeas corpus and denying the petition for a writ of habeas corpus, and remanding the petitioner to the custody of the Commissioner of Immigration at Angel Island, California, to be deported upon the warrant of deportation issued and now outstanding against him, be reversed and for such other and further relief as the Court may think meet and proper.



Dated April 17th, 1916.

MARSHALL B. WOODWORTH,  
S. LUKE HOWE,

Attorneys for Defendant.

Service of the within by copy admitted this 17  
day of Apr. 1916.

JNO. W. PRESTON,  
C.G.H.

Attorney for Respondent.

[Endorsed]: Filed Apr. 17, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [28]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas  
Corpus.

**Order Allowing Appeal.**

Upon motion of Marshall B. Woodworth, Esq., one  
of the attorneys for the petitioner in the above-  
entitled matter, and upon filing the petition for an  
appeal and assignment of errors herein, it is hereby  
ordered that an appeal be, and it is hereby, allowed  
to have reviewed in the United States Circuit Court  
of Appeals for the Ninth Circuit the judgment here-  
tofore rendered herein sustaining the demurrer to  
the petition for a writ of habeas corpus and denying  
the application and petition for the writ of habeas  
corpus, and other matters and things in said petition  
and assignment of errors set forth; and that mean-

while all further proceedings in this court be suspended, stayed and superseded until the determination of said appeal.

Dated April 17, 1916.

WM. W. MORROW,  
United States Circuit Judge, Ninth Judicial Circuit.

Service of the within by copy admitted this 17 day  
of Apr. 1916.

JNO. W. PRESTON,  
C.G.H.

Attorney for Respondent.

[Endorsed]: Filed Apr. 17, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [29]

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*In the District Court of the United States, Northern  
District of California, First Division.*

No. 15,753.

In the Matter of JOSEPH B. KATZ, on Habeas  
Corpus.

**Stipulation that Original Exhibits Attached to Peti-  
tion of Joseph B. Katz and to Petition of Harry  
H. Katz be Transmitted to the Clerk of the Cir-  
cuit Court of Appeals and that the Same Need  
not be Printed in the Transcript of Record.**

It is hereby stipulated and agreed, by and between  
counsel for the respective parties, that the exhibits  
attached to the petition of Joseph B. Katz and to  
the petition of Harry H. Katz may be transmitted to  
the clerk of the Circuit Court of Appeals and that  
the same need not be printed in the transcript of

record. The exhibits are Exhibits "A," to "NN," attached to petition of Joseph B. Katz, and Exhibits "CCC" to "VVV," attached to petition of Harry H. Katz.

Dated April 14, 1916.

JNO. W. PRESTON,  
United States Attorney.  
MARSHALL B. WOODWORTH,  
S. LUKE HOWE,  
Attorneys for Petitioner.

**Order.**

Pursuant to said stipulation, it is hereby ordered that said exhibits may be detached from said petitions and transmitted to the clerk of the Circuit Court of Appeals.

Dated May 8, 1916.

M. T. DOOLING,  
U. S. Judge.

[Endorsed]: Filed May 8, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [30]

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**Certificate of Clerk, U. S. District Court, as to  
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 30 pages, numbered from 1 to 30, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Joseph B. Katz, on Habeas Corpus, No. 15,753, as the same now remain on file and of record in the office of the clerk of said court;

said transcript having been prepared pursuant to and in accordance with the "Praecipe" (copy of which is embodied in this transcript), and the instructions of the attorney for petitioner and appellant herein.

I further certify that the costs for preparing and certifying the foregoing transcript on appeal is the sum of Sixteen Dollars and Thirty Cents (\$16.30), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto is the Original Citation on Appeal issued herein, page 32.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 9th day of June, A. D. 1916.

[Seal]

WALTER B. MALING,  
Clerk.

T. L. Baldwin,  
Deputy Clerk.

CMT.

[Ten Cent Internal Revenue Stamp. Canceled  
6/9/16. T. L. B.] [31]

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**Citation on Appeal.**

UNITED STATES OF AMERICA.—ss.

The President of the United States, to Commissioner  
of Immigration at Port of San Francisco, Cali-  
fornia, Greeting:

You are hereby cited and admonished to be and  
appear at a United States Circuit Court of Appeals  
for the Ninth Circuit, to be holden at the City of San



Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Joseph B. Katz is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, First Division, this 16th day of May, A. D. 1916.

M. T. DOOLING,

United States District Judge. [32]

United States of America,—ss.

On this 16th day of May, in the year of our Lord one thousand nine hundred and sixteen, personally appeared before me, Martin Aronsohn, the subscriber, Marshall B. Woodworth and makes oath that he delivered a true copy of the within citation to the United States Attorney for the Northern District of California, Attorney for Commissioner of Immigration at Port of San Francisco, Cal.

MARSHALL B. WOODWORTH.

Subscribed and sworn to before me at San Francisco, Cal., this 16 day of May, A. D. 1916.

[Seal]

MARTIN ARONSOHN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 15,753. United States District Court for the Northern District of California, First Division. Joseph B. Katz, Appellant, vs. Commissioner of Immigration at Port of San Francisco, Cal. Original. Citation on Appeal. Filed May 16, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

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[Endorsed]: No. 2812. United States Circuit Court of Appeals for the Ninth Circuit. Joseph B. Katz, Appellant, vs. Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed June 9, 1916.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

No. 2812.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

JOSEPH B. KATZ,

*Appellant,*

VS.

COMMISSIONER OF IMMIGRA-  
TION at the Port of San Francisco,  
California,

*Appellee.*

## OPENING BRIEF ON BEHALF OF APPELLANT

Upon Appeal from the United States District Court for  
the Southern Division of the Northern District  
of California, First Division.

MARSHALL B. WOODWORTH,

*Attorney for Appellant*

S. LUKE HOWE,

*Of Counsel.*

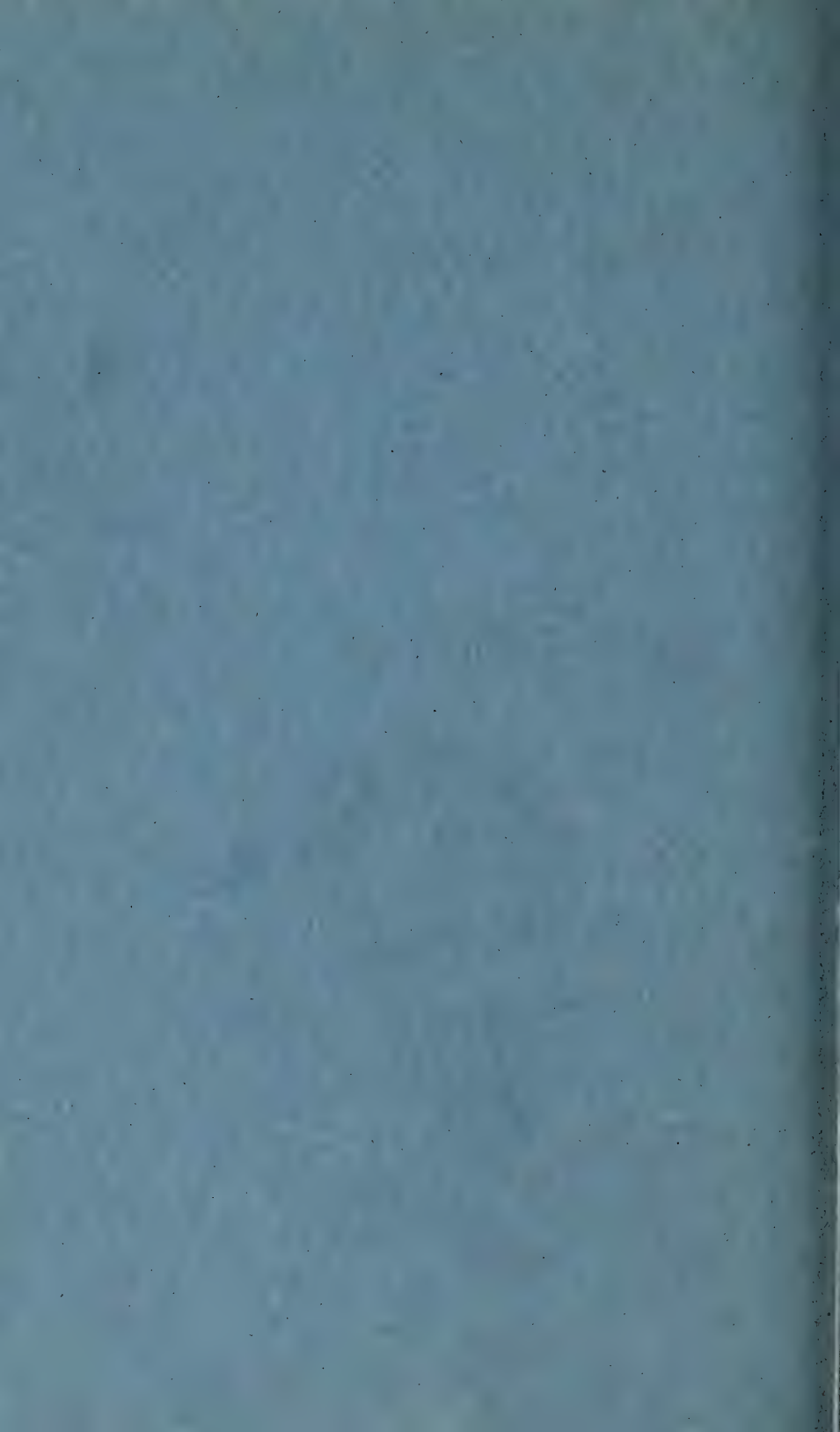
Filed

FEB 27 1917

Filed this.....day of March, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.





No. 2812.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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JOSEPH B. KATZ,

*Appellant,*

VS.

COMMISSIONER OF IMMIGRA-  
TION at the Port of San Francisco,  
California,

*Appellee.*

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## OPENING BRIEF ON BEHALF OF APPELLANT

Upon Appeal from the United States District Court for  
the Southern Division of the Northern District  
of California, First Division.

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## STATEMENT OF THE CASE.

Appellant appeals from the order and judgment of the lower Court sustaining the demurrer interposed to his petition for a writ of *habeas corpus*.

(Transcript of Record, pp. 22-23.)

Appellant is an alien and was arrested by the Immigration Officials at Angel Island, California, and ordered deported to the Kingdom of Great Britain and Ireland on the charge of having been "found receiving, sharing in, or deriving benefit from the earn-

ings of a prostitute, or prostitutes," in violation of Section 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910 (36 Stats. 263).

The particular portion of Section 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, involved upon this appeal provides:

"Any alien \* \* \* who shall receive, share in, or derive benefit from any part of the earnings of any prostitute \* \* \* shall be deported, etc."

The facts adduced before the Immigration Officials showed that the appellant was the owner of a small piece of real estate and the house thereon in Colfax, California, which one Nellie White—a prostitute—rented from him and paid him a monthly rental of \$25.00. In other words, he was merely the landlord and the sum of \$25.00 per month was a proper and reasonable rental for the house. The only relation existing between himself and Nellie White was that of landlord and tenant. The record of the proceedings before the Immigration Officials, attached to the petition for the writ of *habeas corpus*, shows that appellant, Joseph B. Katz, plied his trade in Colfax, California, as a barber. His industry, thrift and respectability are vouched for by leading citizens of Colfax, California.

Any imputation that Joseph B. Katz had any interest in the earnings or profits derived from the operation or management of the place as a house of prosti-

tution is not sustained by any legitimate, substantial, or competent evidence.

Needless to say, that surmise, conjecture, rash inferences, or even mere probabilities, do not afford a substitute for some competent evidence, upon which to inflict on an alien, who has sought an asylum in this country, such drastic punishment as banishment.

As was said in *Hanges v. Whitfield*, 209 Fed. Rep. 675, 679-680: The examination "must be a lawful proceeding, the charge established by *competent evidence*, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them." \* \* \* "and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence*, which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them."

As was also well said in *Ex parte Lam Pui*, 217 Fed. Rep. 456:

"It is also elementary that mere suspicion, conjecture, speculation is not evidence, neither can it be made the basis for finding a fact in issue:

This Circuit Court of Appeals announced the same views in *Backus v. Owe Sam Gow*, 235 Fed. Rep. 847, 853-4:

"But mere suspicion or conjecture were not sufficient upon which to base a judgment \* \* \* In the absence of the best evidence obtainable to sustain the same, we may also conclude that the

order of deportation was arbitrary and unfair, and subject to judicial inquiry. (Citing *United States v. Ju Toy*, 198 U. S. 253, 260, 25 Sup. Ct. 644, 40 L. Ed. 1140; *Chin Yow v. United States*, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. ed. 369; *In re Chan Kan*, 332 Fed. 855, 857—C. C. A. — and cases therein cited.)

The dominant idea and theory of the Immigration Officials, upon which they seek to justify the warrant of deportation, is that the appellant, as an alien, is subject to deportation for the reason, if for no other, that he occupied the status of landlord and received a monthly rental of \$25.00 from Nellie White, admittedly a prostitute, said \$25.00 being received and paid to him by Nellie White as rent and for nothing else.

In other words, the theory of the Immigration Officials, upon which they acted and based the warrant of deportation, was that an alien landlord who receives rent from a prostitute comes within the inhibition of Section 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, and was, in effect, receiving, sharing in, and deriving benefit from the earnings of a prostitute, rendering him liable to deportation.

Exception was taken by appellant to such a broad, harsh and unjust interpretation of the law by the Department of Labor, and a petition for a writ of *habeas corpus* was sued out in the Court below.

(See Petition for Writ of *Habeas Corpus*, Transcript of Record, pp. 2-13.)



The appellee interposed a demurrer, which was sustained.

(Transcript of Record, pp. 20-23.)

The reasons given by the learned judge of the lower Court are contained in a very brief opinion, which is as follows:

"The record here shows that Joseph B. Katz is the owner of the house in Colfax; that the same was a house of prostitution; that he knew it, and that he received rent for the house from Nellie White, one of the inmates. I *think* this brings him within the terms of the statute as deriving 'benefit from the earnings of a prostitute.' The demurrer to the petition will therefore be sustained, and the application for a writ denied." (Italics ours.)

(Transcript of Record, p. 22.)

No authorities were cited by the Court below. Indeed, we understand that this is a pioneer case as to the particular interpretation of that portion of Section 3 of the Act of February 20, 1907, as amended by the Act of March 26, 1910. The Department of Labor has never before gone to the extreme limit of holding that an alien, who is merely the owner and landlord of the premises rented by prostitutes, and who only receives money as rent and who has no other interest in the earnings of a prostitute than merely and only as a landlord, is amenable to the severe and drastic punishment of deportation imposed by the Act.

## ARGUMENT.

Banishment is a most severe and drastic punishment. A statute imposing such penalty is highly penal and must be strictly construed. Immigration acts, containing such penal provisions, should, as held by the United States Supreme Court, be strictly interpreted.

As was well said in the case of *Hackfeld v. United States*, 197 U. S. 442, in interpreting an Immigration Act:

“This is a highly penal statute, and we think the well known rule, as laid down by Mr. Chief Justice Marshall in *U. S. v. Wiltberger*, 5 Wheat. 76, 95, is applicable here: ‘The rule that penal statutes are to be strictly construed is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual.’ ”

Keeping this cardinal rule of statutory interpretation in mind, we enter, very briefly, upon a discussion of the proposition involved in the present appeal.

The Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910 (36 Stats. 263), Section 3 thereof, does not specifically provide that alien landlords, receiving money from prostitutes for *rent* as such landlords, *and in no other capacity*, should be deemed to be “found receiving, sharing in, or deriving benefit from the earnings of a prostitute.”

(See Warrant of Arrest, Transcript of Record, p. 5; also Exhibit “A,” p. 1, Original Exhibits.)

It is only by inference, and, we submit, the most

illogical, irrational and unfounded inference that such a view can be taken of the law.

Even the learned judge of the Court below ventures his dubiousness of the correctness of such view, by qualifying his opinion with the significant statement:

“I *think*,” says the learned judge, “this brings him within the terms of the statute as deriving ‘benefit from the earnings of a prostitute.’” (*Italics ours.*)

(Transcript of Record, p. 22.)

We submit, with the utmost respect for the views of the learned and eminent judge of the Court below, that he went much further, in his ruling in this case, than is permitted by the well settled canons of statutory construction in construing highly penal statutes.

If the views of the Court below be correct, then every alien conductor of a railroad or street car who receives fare from a prostitute, knowing her to be such, is subject to deportation as “deriving benefit from the earnings of a prostitute.” Every alien butcher or baker or candlestickmaker, who sells his meat, or bread, or chandelle to a prostitute, knowing her to be such, is liable to banishment as “receiving the earnings of a prostitute.” Every alien dressmaker or modiste, who is paid for dresses or hats by a prostitute, knowing her to be such, is subject to deportation as “sharing in the earnings of a prostitute.” In fact, every alien, who receives any of the earnings of a prostitute, knowing her to be such, for furnishing her with the very necessities of life, or who has any legitimate, financial or commercial dealings with a

prostitute, would be amenable to the drastic penalty of Section 3 above referred to.

We maintain that it is illogical and irrational to impute to Congress, in the enactment of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, such absurd, harsh, mischievous and unjust results. Such results should not be tolerated, if any other sensible and reasonable construction of that particular clause of Section 3 of the Immigration Act in question will permit, compatible with the object of the law.

It is the well settled rule of statutory construction, that, where the language of a statute is ambiguous or otherwise doubtful, or, being plain, a literal construction would lead to such absurdity, hardship or injustice, as to render it irrational to impute to the law making power a purpose to produce or permit such result, that construction should be adopted which will avoid such absurdity, hardship or injustice.

*Moffitt v. United States*, 128 Fed. 375, 63 C. C. A. 117;

*United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278.

The object of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, was to exclude the admission into the United States of certain classes of undesirable aliens; idiots, imbeciles, etc., paupers, persons likely to become public charges, professional beggars, persons afflicted with loathsome or contagious diseases, criminals, polygamists, anarchists, prostitutes, "*persons who are supported by or*



*receive in whole or in part the proceeds of prostitution."* (See Section 2 of the Act.)

While Section 2 of the Act as amended is designed to prevent from *entering* into the United States undesirable aliens, Section 3 thereof relates particularly to the importation of prostitutes and to the deportation, *after entry* into the United States, of prostitutes, pimps and persons generally of the demi-monde class. Severe penalties are imposed for the importation of women for immoral purposes and the drastic punishment of banishment is imposed on alien prostitutes and pimps. Section 3 of the Act of February 20, 1907, (34 Stats. 898) as amended by the Act of March 26, 1910 (36 Stats. 263), reads as follows:

"Sec. 3. That the importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. Jurisdiction for the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said importation by the person or persons accused, or in any dis-

strict in which a violation of any of the foregoing provisions of this section occur. *Any alien* who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or *who shall receive, share in, or derive benefit from any part of the earnings of any prostitute*, or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. That any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and shall be imprisoned for not more than two years. Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this Act. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against a wife or husband."

A mere reading of Section 3 will convince this Appellate tribunal that the sole purpose and object of this provision was to apply to prostitutes, pimps and persons of the demi-monde class and not to aliens generally who may have financial or commercial dealings with that class of people.

A comparison of Sections 2 and 3 confirms this view. Section 2 excludes, among others, "*persons who are supported by or receive in whole or in part the proceeds of prostitution.*" Section 3 seeks to deport the same class of persons when it speaks of "*any alien \* \* \* who shall receive, share in or derive benefit from any part of the earnings of any prostitute.*" Both sections, obviously, refer to that class of human beasts who live off the earnings of fallen women derived from prostitution and acts of sexual immorality.

Therefore, we maintain that the words or language employed in Section 3:

"Any alien \* \* \* who shall receive, share in, or derive benefit from any part of the earnings of any prostitute,"

should be construed to apply solely and exclusively to that class of alien persons known as pimps—*maquereaux*—persons of the *demi-monde* class—who are supported or live off the earnings of fallen women.

The application of the rule of statutory construction known as "*ejusdem generis*" is controlling in this case and limits the general language used in Section 3—now under consideration—to the class of persons previously enumerated in Sections 2 and 3, to-wit: "*prostitutes,*" \* \* \* "*persons who are supported by or receive in whole or in part the proceeds of prostitution.*"

Where general words follow the enumeration of particular classes of persons or things, they will be

construed as applicable only to persons or things of the same general nature or class as those enumerated, under the rule of construction known as "*ejusdem generis*."

Cyc., Vol. 36, pp. 1119-1122 and cases there collated.

This rule is especially applicable to statutes defining crimes and regulating their punishment.

*State v. Erwin*, 91 N. C. 545;  
*Lane v. State*, 39 Ohio St. 312;  
*Ex parte Muckenfuss*, 52 Tex. Cr. 467, 107  
 S. W. 1131;  
*State v. Goodrich*, 84 Wis. 359, 54 N. W. 577;  
*Reg. v. Reid*, 30 Ont. 732.

Limited to that despicable class of human beasts—to alien persons who live off, or are supported by, the earnings of prostitutes—to alien persons of the demi-monde class—the Sections of the Act as amended are given a reasonable, sensible and harmonious interpretation, and one, we add, well calculated to carry into effect the salutary provisions, in that respect, of the Immigration laws of the United States.

But, to give the Act as amended the broad interpretation adopted by the learned Judge of the Court below and make it applicable, in effect, to every alien who has any financial or commercial dealings with prostitutes, for instance an alien landlord who receives his rent from a prostitute, or an alien butcher or an alien baker who sells meat or bread to a prostitute—one of the very necessities of life—is to lead



to such absurd, harsh, mischievous and unjust results, as to make it clear that Congress never intended such sweeping legislation.

General words or language used in a statute must be construed in subordination to the purpose and object of the statute.

*Holy Trinity Church v. United States*, 143

U. S. 457;

*Reiche v. Smythe*, 13 Wall. 162;

*Silver v. Ladd*, 7 Wall. 219;

*Ex parte Young*, 211 Fed. R. 370;

*Moffitt v. United States*, 128 Fed. 375.

The purpose and object of Sections 2 and 3 of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, were to exclude and deport undesirable aliens, to-wit: prostitutes, pimps, and others. An alien landlord, who receives rent from a prostitute or pimp, knowing them to be such, is not, by reason of the mere fact of the relation of landlord and tenant, *undesirable*. No more so than any other alien who has legitimate, financial, commercial dealings with prostitutes, such as a railroad or street car conductor, butcher, baker, etc.

Therefore, we contend that the penal provisions of Section 3 of the Immigration Act as amended, in construing the words "shall receive, share in, or derive benefit from any part of the earnings of any prostitute," should be limited to alien persons who are directly supported by or live off the earnings of fallen women, and not to the general class of alien merchants, tradesmen, landlords, and what not, who,

incidentally and during the course of their business dealings with prostitutes, may receive moneys which were earned by unfortunate women in pursuing their nefarious calling. The words of the particular clause of Section 3, now under consideration, should be limited, not enlarged.

We have not succeeded in finding, nor has our attention been called, to any decision of the Federal Courts, construing the particular clause of Section 3 in question. However, another and subsequent portion of the same clause of Section 3 has been construed, and the rationale of that decision supports the argument we here advance.

In *Ex parte Young*, 211 Fed. Rep. 370, the words construed were: "Any alien \* \* \* who in any way assists, protects, or promises to protect from arrest any prostitute, \* \* \* shall be deported." This provision is part of the same clause of Section 3 of the Immigration Act as amended now under consideration. In the case cited, it was held that the charge of assisting, protecting, etc., any prostitute should be *limited* to assistance furnished such person in order to enable her to continue to *practice prostitution*. In other words, the broad and general language used in Section 3 of the Immigration Act as amended, which is a highly penal act, was *limited* to the purpose and object of the Act in *excluding* prostitutes, pimps, etc., and in *deporting* them, after their entry into the United States. A broad interpretation of the language construed in *Ex parte Young*, *supra*, would have, manifestly, applied to any alien

in any way assisting or protecting prostitutes however charitable or benevolent the motive of such alien.

"It is earnestly insisted by counsel for petitioners that the words 'in any way assists, protects, or promises to protect from arrest' mean in any way assist from arrest, as by furnishing money to escape to one who is threatened with arrest. The argument is more ingenious than convincing. If such were the meaning, there are so many more apt words in which to express it that it seems unlikely that such could have been the intention.

"On the other hand, if the words 'any alien who in any way assists \* \* \* a prostitute' are given their widest meaning, so as to include an alien who gives food, shelter, or medicine to a prostitute, which, it is contended, is the only other meaning of which they are capable, a conclusion is reached which is still more abhorrent to reason. *A more satisfactory conclusion is that the intention was to declare unlawful the presence in this country of any alien who in any way assists a prostitute to practice prostitution, or towards its practice. Holy Trinity Church v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.*"

*Ex parte Young*, 211 Fed. Rep. 370, 373.

We think that the views expressed in *Moffitt v. United States*, 128 Fed. 375, 63 C. C. A. 117, are apposite to, and should control, the statutory construction involved in the case at bar:

"Immigration statutes should not be so construed as to include cases which, *although within the letter, are not within the spirit, of the law.* All law should receive a sensible construction. *General terms contained therein should be so lim-*

*ited in their application as not to lead to injustice, oppression, or absurd consequence."* (Italics ours.)

The same views were expressed in *Holy Trinity Church v. United States*, 143 U. S. 457. That case involved a provision of an immigration act which made it unlawful for any one in the United States "to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States \* \* \* under contract or agreement \* \* \* to perform labor or service of any kind in the United States, its Territories or the District of Columbia."

It appeared that the Holy Trinity Church made a contract with one E. W. Warren, a resident of England, to remove to the City of New York and enter its service as rector and pastor. The church was proceeded against under the act and judgment was rendered against it. (See 36 Fed. 303.)

The Supreme Court of the United States reversed the judgment, and, in an elaborate opinion by Mr. Justice Brewer, declared that: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

Furthermore, we venture the suggestion that any legislation along the lines of the broad interpretation, given by the learned Judge of the Court below to the language of the particular clause of Section 3 of the Immigration Act as amended—now under considera-



tion—would be unconstitutional. It was held in the case of *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, that aliens within the territory of the United States are entitled, equally with citizens of the United States, to the protection of the 5th and 6th amendments to the Federal Constitution.

See, also, *Yick Wo v. Hopkins*, 118 U. S. 369, 30 L. ed. 226.

We maintain that if the language of the particular clause—now under consideration—of Section 3 of the Immigration Act as amended is deemed applicable to every alien who receives, in a legitimate or business way, moneys from a prostitute which she has earned as such, for instance, an alien landlord, or alien butcher, or alien baker, etc., such legislation would be unconstitutional and violative of common rights guaranteed by the Constitution of the United States to all persons—alien and citizen alike—living within the territory of the United States. Such legislation would be destructive of common rights. Prostitutes, whether aliens or citizens, have a common and inalienable right to pay rent for shelter and sleep, and to the common necessities of life. The mere fact that their earnings to pay rent or the common necessities of life come from the degraded calling which they ply, cannot render aliens, who receive such earnings in a lawful, legitimate and business way, “undesirable” to such an extent as to render them subject to banishment.

Legislation violative of common, constitutional rights has been held void.

*Hechinger v. Marysville*, 22 Ky. L. Report 486,  
49 L. R. A. 114.

It is well settled that: "Ordinances have been declared illegal because their language allowed an interpretation which would cover *harmless acts*, or which failed to make exceptions that might under circumstances become necessary."

Freund Police Power, Sec. 158;  
*Ex parte McCarver*, 39 Tex. Crim. 448, 42  
L. R. A. 587;  
*State v. Hunter*, 106 N. C. 796, 8 L. R. A. 529;  
*Hechinger v. Marysville*, 22 Ky. L. Report 486,  
49 L. R. A. 114.

NO EVIDENCE THAT APPELLANT RECEIVED ANY OF THE EARNINGS OF ANY PROSTITUTE OTHER THAN AS LANDLORD OR THAT HE HAD ANYTHING TO DO WITH THE MANAGEMENT OF THE HOUSE OF PROSTITUTION OPERATED BY NELLIE WHITE.

While we do not apprehend that the United States Attorney will seriously contend that there is any competent, legitimate, or substantial evidence that appellant had any interest in the house of prostitution operated in Colfax, California, by his tenant, Nellie White, *other than as landlord*, still the character of some of the affidavits presented against the appellant

and upon which the Immigration Officials acted in ordering him deported lead us, briefly, to explain them to this Appellate tribunal, so that no injustice may be done appellant.

The learned Judge of the Court below did not find as a fact, nor did he decide, that appellant had any interest in, or took any part in the management of, the house of prostitution operated by Nellie White *other than as landlord*. The case, as we have seen, was decided against appellant upon a question of law. It was determined on the theory, *and on the theory alone*, that the mere fact that he was an alien and owned the property and was paid a rental of \$25 a month, which was presumed to come from the earnings of Nellie White as a prostitute, made him amenable to deportation under the provisions of Section 3 of the Immigration Act as amended.

We are satisfied that a perusal, by this Court, of the record of the proceedings before the Immigration Officials will establish that there is no legitimate, or substantial, or competent evidence to hold that the appellant had any interest in, or took any part in the management of, the house of prostitution operated by Nellie White *other than as landlord*. A complete record of the proceedings before the Immigration Officials was appended to the petition for a writ of *habeas corpus* as exhibits and, by stipulation, these exhibits were transmitted to this Court and are now on file with the Clerk in their original form, in a volume separate from the Transcript of Record, the

stipulation also waiving the printing of the same in the Transcript of Record.

(See Transcript of Record, pp. 14-18, 32-33; see original exhibits "A" to "NN" and "CCC" to "VVV," in a separate volume.

In this connection, it is not improper to call this Court's attention to the fact that the learned Judge of the Court below, in passing upon the evidence against Harry Katz, a brother of the appellant, Joseph B. Katz, who was also ordered deported by the Immigration Officials, as being the *manager* and *interested* in the *same house*, of which the appellant is the owner of the house and land, held the evidence, upon which the warrant of deportation was based against the brother, to be entirely insufficient. The evidence against both brothers was substantially the same.

Counsel for appellant was also counsel for appellant's brother, Harry Katz, in the *habeas corpus* proceedings in the Court below, and is in a position to state that the Immigration Officials endeavored to make out a stronger case against Harry Katz than they did against his brother, Joseph B. Katz, the appellant upon this appeal. They sought to deport the brother, Harry Katz, on the ground that he was the active manager of the place. But, as stated, the learned Judge held that there was "no real evidence against the petitioner" (Harry Katz).

We have incorporated in the Transcript of Record upon this appeal the opinion of the learned Judge of the Court below rendered in the *habeas corpus* pro-



ceedings instituted in behalf of Harry Katz. The opinion is instructive and persuasive inasmuch as the Immigration Officials based their order of deportation against the appellant Joseph B. Katz upon substantially the same affidavits, reports and other matters contained in the exhibits appended to the petition for *habeas corpus* instituted in behalf of the appellant, and now on file with the Clerk of this Court. Said the learned Judge, in his opinion and order overruling the demurrer to the petition for a writ of *habeas corpus* in behalf of Harry Katz, as follows:

"The records here which accompany the petition show *no real evidence against the petitioner. The affidavits are upon information and belief, and express only the opinions of the affiants.* It is true that in this State the reputation of a house as a house of ill-fame, may be shown, but I know of no rule, here or elsewhere, which permits the ownership or management of such a house to be thus proved. There should be, in my opinion, some *fair, substantial testimony* upon which to base an order deporting from this country an alien who has lawfully entered it. The record here is too long to recite, but the closest scrutiny of it will not reveal in all the testimony taken, whether in the presence or absence of petitioner, *any competent evidence*, and by that I mean evidence *other than pure hearsay and expressions of opinion*, tending to support the finding that petitioner was *either connected with the management of a house of prostitution or has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes.* It may be true that the presence of petitioner in this country is displeasing to many worthy people, but he may not be deported for that reason. He can only be deported after *a fair hearing*, and then only when

the order deporting him finds support in something other than *mere hearsay and opinion*. The demurrer to the petition will be overruled, and a writ will issue returnable December 11th, 1915, at 10 o'clock a. m.

November 26th, 1915.

M. T. DOOLING, Judge.

(Endorsed): Filed Nov. 26, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk." (Italics ours.)

(Transcript of Record, pp. 24-25.)

The ruling of the learned Judge of the Court below that: "The records here which accompany the petition show *no real evidence* against the petitioner" (Harry Katz), applies equally to the records which accompany the petition in the case against appellant, Joseph B. Katz. There is no real evidence against the appellant. "The affidavits are upon information and belief, and express only the opinions of the affiants."

## EPITOME OF ALLEGED EVIDENCE AGAINST APPELLANT, JOSEPH B. KATZ, AND POINTS AND AUTHORITIES.

Harry Katz and Joseph B. Katz are brothers. Two separate warrants of arrest were issued against them, as well as two separate warrants of deportation. Separate affidavits claimed to support the warrants of arrest were presented against each of the brothers and separate preliminary hearings before the Immigration Officers were held as to each brother and thereafter the hearings of each brother were separately con-

ducted until the hearing held on September 2, 1914, (see exhibit "CCC," pp. 73-75, in volume containing original exhibits), when the alleged evidence against both brothers was jointly presented.

With reference to the appellant, Joseph B. Katz, (who is a barber at Colfax and has been for several years), the application for the warrant of arrest is dated February 27, 1914. The warrant of arrest against Joseph B. Katz is dated February 26, 1914. It will be observed, from a reading of the application for the warrant of arrest, that on February 25, 1914, a telegraphic application for the arrest of Joseph B. Katz had been sent from Colfax to Washington, D. C., by Immigration Inspector Griffiths.

The secret or preliminary hearing before Examining Inspector D. J. Griffiths was held March 6, 1914, at Angel Island, California. The first regular hearing, by which we mean a hearing at which the counsel for Joseph B. Katz were permitted to be present, was held May 8, 1914. The second regular hearing of the charges made against Joseph B. Katz was held on June 19, 1914, at Angel Island, California. The third and final hearing of the charges made against Joseph B. Katz was held on September 2, 1914, at Angel Island, California. At this third and final hearing, the charges against both the Katz brothers were jointly heard.

This preliminary explanation is made to avoid confusion to the Court and to opposing counsel in view of the somewhat voluminous records attached to the petition for a writ of *habeas corpus*, and contained in a separate volume, as already stated.

The warrant of arrest against Joseph B. Katz charges him simply and only with being an alien unlawfully within the United States in that he has been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes. (See Warrant of Arrest in Joseph B. Katz case, Exhibit "A," p. 1.) He was not accused, in the warrant of arrest, of having anything to do with the management of any house of prostitution. The warrant of deportation against Joseph B. Katz is based upon the same ground as that contained in the warrant of arrest. (See Warrant of Deportation, in Joseph B. Katz case, Exhibit "LL," p. 44.)

It is but fair to Joseph B. Katz to say that the record discloses that the only claim seriously urged by the Immigration Officials against him was that he was liable to deportation simply because he happened to be an alien-landlord of the premises used as a house of ill-fame. While the Act of March 26, 1910, does not specifically provide that an alien landlord of premises used for purposes of prostitution shall be subject to deportation, the Immigration Officials, with a display of considerable ingenuity, seized with avidity upon the words, contained in the Act of Congress of March 26, 1910: "Who shall receive, share in, or derive benefit from any part of the earnings of any prostitute." It was argued by them, and will undoubtedly be maintained before this Honorable Court by the United States Attorney, that, inasmuch as Joseph B. Katz admittedly was the landlord of the property used by one Nellie White as a house



of prostitution and as he received, as such landlord, *but in no other capacity*, a monthly rental of \$25, for the rent of the premises, he was, in effect, receiving, sharing in, or deriving benefit from a portion of the earnings of a prostitute, the theory being that the \$25 monthly rental paid to Joseph B. Katz purely as landlord by Nellie White must have been made up in part or in whole out of the earnings of one or more of the prostitutes frequenting the place.

It is clear, from this statement, that the only question seriously involved, upon the subject of the deportation of Joseph B. Katz, is whether a mere alien landlord, who simply receives a monthly rental for the use of his property, and does not receive said monthly rental in any other capacity than as landlord, that is, not as a maquereau, can be said to be within the inhibition and serious penalty of Section 3 of the Act of March 26, 1910, which renders liable to banishment: "any alien, \* \* \* who shall receive, share in, or derive benefit from any part of the earnings of any prostitute."

This presents simply a question of law, and involves an interpretation of Section 3 of the amendatory Act of March 26, 1910, and the intent of Congress in that regard, which we have already fully discussed.

In this connection, it will be observed that Joseph B. Katz is not accused in the warrant of arrest, or adjudged guilty in the warrant of deportation, *as was his brother Harry Katz*, of having had anything to do with the management of the premises as a house of

prostitution. As to him, the charge contained in the warrant of arrest and the proofs, or rather alleged proofs, were limited, and raise a clean-cut question of law, as already indicated.

It is to be further noted, in connection with the application for the warrant of arrest against Joseph B. Katz and the issuance of the warrant of arrest against him that the name of one Nellie White is included in the application for, and the warrant of, arrest. Nellie White was never apprehended by the immigration authorities, and we have never and do not now represent her.

The record is devoid of a single affidavit from any of the unfortunate inmates of the place rented by Joseph B. Katz to Nellie White. Not a single woman is produced, not a single affidavit is obtained and submitted in the record in which any of the inmates complained that either Joseph B. Katz or Harry Katz ever, at any time, or place, whether in Colfax or elsewhere, received, or shared in, or derived any or the slightest benefit from her earnings as a prostitute.

There is an entire absence of any direct evidence against either of the two brothers to sustain any of the charges preferred against them in the warrants of arrest.

In the absence of any direct evidence against either of these two brothers, an heroic effort was made by a number of the good women and men of Colfax to rid that place of the house of prostitution run by Nellie White and rented from Joseph B. Katz, by preferring charges against both the Katz brothers to

the Immigration Officials, charges admittedly based upon information and belief, and endeavoring to deport the Katz brothers upon information and belief, hearsay, opinions, conclusions, surmises and conjectures; in other words, producing anything and everything except competent and legitimate evidence. An examination of the records before the Immigration Officials will bear out the truth of what we here maintain.

We contend, outside of the question of law applicable to the warrant of deportation against Joseph B. Katz, as to whether the mere fact of his being the landlord of property used for disreputable purposes makes him liable to deportation, that:

First: There is an absolute insufficiency of any alleged evidence, either in fact or in law, to support the warrant of deportation against Joseph B. Katz;

Second: That "information and belief," hearsay, opinions, conclusions, surmises or conjectures, or anything not recognized by the established rules of law as competent and legitimate evidence, can not be made the basis of a warrant of deportation;

Third: Unfairness of hearing in many particulars.

These contentions necessarily require an examination of the affidavits and other matters submitted to, and by, the Immigration Officials, in their recommendation and report to the Secretary of Labor asking for warrants of deportation against the Katz brothers.

In order to assist the Court as well as opposing

counsel, we prepared quite a comprehensive index of the numerous exhibits and other documentary matters appended to the petition and have minutely identified them for purposes of convenience. (See Index, Transcript of Record, pp. 14-18.)

Joseph B. Katz was charged upon a warrant of arrest (after having been arrested by telegraphic order at the request of Examining Inspector Griffiths) based upon *ex parte* affidavits—some 10 in number—made by a number of the good ladies of Colfax. These ladies also presented similar affidavits against appellant's brother, Harry Katz, which, as we have seen, were designated by the learned Judge of the Court below in his opinion in the Harry Katz *habeas corpus* proceeding as: "the affidavits are upon information and belief, and express only the opinions of the affiants." (See Opinion, Transcript of Record, p. 24.)

Examining Inspector Griffiths admitted, at the first public hearing of the charge against Joseph B. Katz held on May 8, 1914, (see Exhibit "X" in Joseph B. Katz's case, p. 28, of volume containing original exhibits), that these affidavits were nothing more than "information and belief" affidavits. They all appear to be carbon copies one of the other.

The following colloquy, between counsel for appellant and the Examining Inspector at the first public hearing, discloses:

"(Mr. Woodworth): Now, if you agree that these affidavits are simply based upon information and belief, then we are satisfied to present counter affidavits, otherwise, if it is going to be claimed that they assert any facts of their own



knowledge, we want the privilege of cross examining these witnesses.

"(Inspector Griffiths): The affidavits were made before me, as stated in the bottom of the letter, on *information and belief*."

(See record of proceedings at first public hearing, "Exhibit X," p. 28, of separate volume containing original Exhibits.)

Being such, they do not constitute any legitimate or competent evidence at all. While they may have been sufficient to justify the arrest of Joseph B. Katz, yet, upon the hearing, they were valueless as evidence and were inadmissible according to the rule laid down in *Hanges v. Whitfield*, 209 Fed. Rep. 675, and *Ex parte Lam Pui*, 217 Fed. Rep. 456. These authorities distinctly hold that, under the provisions of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, which authorize the arrest and deportation of aliens, who have lawfully entered the United States, for certain causes subsequently arising, *ex parte* affidavits and other documentary evidence may be taken *preliminary to, and as a basis for, an application* for a warrant for the arrest of an alien so charged, but such affidavits *can not be again used as evidence against him on his hearing after arrest*, at which he is entitled to be represented by counsel and to cross-examine the witnesses against him.

The opinion in these cases will be found to be very instructive and they consider in detail the rights of aliens arrested to be deported for causes arising subsequent to their entry into the United States.

After calling attention to the Immigration rules of November 15, 1911, especially rule 22 and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings, the learned Judge in the case of *Hanges v. Whitfield* says:

"Testimony may, no doubt, be taken in the form of affidavits, *or otherwise*, preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration Officers are credibly informed, or have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported?

\* \* \* It is incumbent upon the Government to establish by *competent evidence* that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized official of the Government; but it must be a *lawful proceeding*, the charge established by *competent evidence*, and the aliens afforded a *fair hearing and opportunity to discredit or disprove the evidence adduced against them*. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, *with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported*.

"The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth

in all disputed matters of fact; and it is indispensable in all judicial proceedings in this country, civil or criminal, that *ex parte* testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceeding to the party whom it is proposed to be used to cross-examine the witnesses giving such testimony, *cannot rightly be used against him*. 1 Greenl. Ev. (16th Ed.) 447; 2 Wigmore on Ev. 1361, 1365.

"In this case, it appears without dispute that the petitioners were not informed at any time of their right to counsel until *after* the inspector had taken the *ex parte* affidavits and examined the petitioners at length, when at the close of such examination he asked each, 'if he desired counsel.' Upon each answering that he did, the Inspector then fixed a time for the further hearing and postponed it accordingly. At such further hearing, counsel for the petitioners requested of the Inspector that the witnesses whose *ex parte* affidavits or statements had been previously taken be recalled that they might be cross-examined, which requests the Inspector denied. Some of the witnesses whose statements were taken by the Inspector were called by the petitioners but refused to testify unless the Inspector would so request, which request he refused to make. Others of the affiants the petitioners could not procure. *They were thus prevented from obtaining their testimony either upon direct or cross-examination. True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the Inspector prior to the application for the warrant of arrest; but of what avail was that?* That testimony had already been forwarded to the Bureau of Immigration, and an inspector of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthful-

ness by legitimate cross-examination or otherwise. *That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rights, cannot be successfully maintained.*

"It is contended on behalf of the Inspector that he is authorized under Rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, *it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported except upon legal evidence, which establishes with reasonable certainty, at least the charges upon which it is sought to deport them.*"

This case was affirmed by the Circuit Court of Appeals.

*Whitfield v. Hanges*, 222 Fed. 475.

See, also, the well considered case of *Ex parte Lam Pui*, a decision by District Judge Connor, 217 Fed. Rep. 456.

Among other rules of law ably discussed by that learned Judge, applicable to deportation proceedings, are the following:

"Text-writers and judges have undertaken to define the word 'evidence,' as applicable to judicial investigation, with more or less success.



Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

“‘Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.’ Draft, Code.

“It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. *It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue.* The industry of counsel affords a number of illustrative expressions of courts. In *People v. Van Zile*, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

“‘Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.’

“Judge Caldwell, in *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

“‘The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.’

“It may be that, upon a full, fair hearing, in which petitioner has the benefit of counsel, and all of his rights secured to him, the government will be able to establish the charge made against him. I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

“The petitioner is entitled to be discharged from custody. An order to that effect will be drawn.”

Therefore, it is clear that these ten carbon-copy "information and belief" affidavits do not constitute any evidence whatever against Joseph B. Katz and their admission against him as a basis for the warrant of deportation deprived him of that full and fair hearing required by the law and regulations of the Department of Labor. These affidavits must be, therefore, eliminated from consideration. Outside of these "information and belief" affidavits, there is no competent or legitimate evidence to sustain the warrant of deportation.

We proceed, briefly, to a consideration of each one of the other affidavits and documents introduced against Joseph B. Katz, keeping in mind that they were also used against Harry Katz, his brother, and pronounced by the Court below as establishing "no real evidence" against him.

The next document, introduced against the appellant and used by the Immigration Officials in ordering his deportation, is an adverse report and recommendation of Examining Inspector Griffiths, made against the appellant and his brother Harry Katz, dated July 23, 1914. (Exhibit "HH," pp. 39-40; same Exhibit "LLL," pp. 91-92, in Volume containing original Exhibits.)

It should be explained, in this connection, that the cases against the Katz brothers were closed and submitted for the action of the Washington authorities on June 19, 1914. (See Exhibit "MM," pp. 45-47, of Volume containing original Exhibits.)

The records in both cases were sent on to Washing-

ton for consideration and action. Thereafter, the authorities in Washington expressed doubt as to the deportability of the Katz brothers upon the evidence then presented, and called, from the Commissioner of Immigration at Angel Island, for further evidence and investigation "into the managerial relation of the Katz brothers to the house of prostitution in that town, of which Nellie White was the madam, in February last." (See Exhibits "HH" and "CCC," *supra*.)

Insofar as this adverse report and recommendation purports merely to be an adverse report and recommendation it, of course, is unobjectionable as a matter of law, however false and fallacious may be the premises upon which it is based; but when this adverse report and recommendation purports to state certain matters, *as facts against the Katz brothers*, as the result of the private and secret investigations of the Examining Inspector, then it becomes an offensive and vicious document inadmissible in any court of justice in the land; it is clearly hearsay, information and belief, abounds in conclusions, opinions; the statements are those of a prejudiced and partisan officer; it is not sworn to; there is no cross-examination of the officer; he is not offered as a witness; such a document has no place in any proceeding, administrative or otherwise, where the liberty of a person is involved, especially where the penalty is as serious and irreparable as that of banishment.

Furthermore, the matters in the adverse report and recommendation stated as facts against the appellant

are not supported by any direct evidence or any evidence or circumstances testified to by witnesses, from which any just and legitimate inferences against the appellant can be drawn.

*Ex parte Lam Fuk Tak*, 217 Fed. Rep. 468, 469.

In this connection, it should be stated that, when the officials at Washington ordered a re-investigation as to the managerial relation of the Katz brothers with reference to the place run by Nellie White, it was apparently directed to the ownership of the furniture and personal belongings in the house rented by Nellie White, the idea evidently being that, if the proofs showed that the Katz brothers had bought the furniture for the house, that would be evidence of the fact that they were connected with the management of such a place.

Outside of the conjectures and surmises of Examining Inspector Griffiths, and other matters stated by him, entirely unsupported by any evidence, it was affirmatively shown that neither one of the Katz brothers furnished the place, and that Joseph B. Katz had nothing to do with the place except in the mere capacity of landlord, such as paying water-bills, taxes, repairs, etc., as owner of the property.

The affidavit of George J. Meister, connected with the furniture store of Breuner & Company at Sacramento, effectually disposes of any pretense that the Katz brothers furnished the place as a house of ill-fame for Nellie White. (See Exhibit "KK," p. 43.)



His affidavit shows that Nellie White furnished the place herself. Both of the Katz brothers emphatically deny that they ever furnished the house for any such purposes.

As already stated, if the report of Examining Inspector Griffiths be regarded simply in the nature of a recommendation to his superior, the Commissioner of Immigration, no objection could be made to it on that ground. But, an examination of that report shows its unfairness to these Katz brothers in that it purports to report matters, *as proved facts against them*, when the record shows that not a single witness swears to any such facts. Further, the absurdity of the situation is realized and the unfairness of the whole proceeding appreciated when the record shows that Inspector Griffiths is the original investigator of the charges against the aliens; that he is the arresting officer; that he is the inquisitor; that is the Examining Inspector who has charge of the secret examinations and hearings; that he is the judge who make the recommendation to his chief, the Commissioner of Immigration. Such being the fact, how, in the name of justice, his report, containing statements of fact against the Katz brothers which he claims to have gathered from his investigations of a secret and private nature, can be dignified by the name of evidence is inexplicable to us. Such a proceeding is intolerable and a prostitution of justice itself. Its unfairness is obvious.

As was well said by District Judge Holt, in the frequently cited case of *United States etc. v. Williams*,

185 Fed. 598, 599, after referring to the usual procedure in deportation proceedings:

*"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. \* \* \* The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."*

Such a report of the Examining Inspector, purporting to state *as facts* matters he claimed to have discovered in his investigations, not even being sworn to and the Inspector not offering himself as a witness so that he might be cross-examined, was eminently improper and deprived the appellant of that full and fair hearing guaranteed to every one by the laws of this country. As was well said, in *Ex parte Lam Fuk Tak*, 217 Fed. 468, 469, of a somewhat similar situation to that developed in the case at bar:

*"At this point the inspector put in a record: 'On the occasion of the visit to that laundry by the inspector in charge, on or about December 20, 1913, this Chinaman was found engaged in laundry work there—126 Market Street.' \* \* \**

*"Except for the statement inserted in the record, not under oath, and doubtless without the*

knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*

“THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND DISREGARDED. THE FACT THAT IT IS INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED.”

And in *Ex parte Plastino*, 236 Fed. R. 295, 297, it was said: “The statement of the inspector in this record, unsupported by oath, is not testimony. Even though it had been given under oath, it is not testimony which would be admitted in any Court, as it is the inspector’s conclusion, etc.”

The next document is the affidavit of Robert A. Peers, husband of Lucy F. S. Peers, the Secretary of the Committee of Fifteen. (Exhibit “DDD,” p. 76.)

That affidavit refers principally to Harry Katz, appellant’s brother, who, as we have seen, was discharged on *habeas corpus* because of the insufficiency of the proofs. This affidavit relates to matters occurring in

1909—five years prior to the arrest of appellant. We do not understand that the amendatory act of March 26, 1910, with its drastic penalties, under which it is sought to deport appellant, is retroactive.

*U. S. v. Tauji Suckichi*, 199 Fed. 750;  
*U. S. v. Heth*, 3 Cranch 399, 2 L. ed. 479;  
*U. S. v. Int. Mer. Co.*, 204 Fed. 702;  
*U. S. v. North German Lloyd S. S. Co.*, 185  
 Fed. 158;  
*U. S. v. North German Lloyd S. S. Co.*, 186  
 Fed. 672;  
*Hackfeld v. U. S.*, 197 U. S. 442;  
*Moffitt v. U. S.*, 128 Fed. 375.

The affidavit is worthless as competent or any evidence of any facts to support the deportation of either of the Katz brothers. The affidavit abounds in hearsay statements, conclusions, information and belief, and other rash and irresponsible statements, unworthy of the name of evidence. He says:

“The affiant also avers that since that time (1909) the two brothers, Harry Katz and Joseph Katz, have conducted a house of prostitution on the property described as lot 1, block 2, additional survey of the town of Colfax and it is a well known fact in Colfax that the Katz brothers were interested in the management of this house of prostitution over which Nellie White, a notorious prostitute, presided as madam.”

This statement simply represents the conclusions of the affiant that “they have conducted” and “it is a well known fact.” The further statement: “The affiant avers that he has never heard these things denied until the arrest of Harry and Joseph Katz in 1914,” is not



testimony of any fact. The mere fact that he never heard anything denied is no evidence of anything, especially when cross-examination is denied to the petitioners and no notice given of the taking of this affidavit. The affidavit further states that "he has frequently heard" and "it was generally understood by the people of Colfax."

Such rash and improper statements do not constitute competent or legitimate evidence upon which to base an order of banishment, especially when cross-examination is denied and no notice given of the taking of the affidavit.

The next affidavit is that of Lucy F. S. Peers (wife of the previous affiant) and the Secretary of the Committee of Fifteen formed to rid Colfax of houses of prostitution. (Exhibit "EEE," p. 77.)

This Honorable Court will observe that this is *only* the second affidavit made by the energetic Mrs. Peers to deport the Katz brothers. She made the first affidavit on February 24, 1914, hers being one of the ten "information and belief" affidavits in support of the application for a warrant of arrest. (Exhibit "J," p. 10.) The present affidavit is the second against the appellant. (Exhibit "EEE," p. 77.) In this affidavit she endeavors to state an interview that occurred between herself and another affidavit-maker, Jeannie K. Lobner (see Exhibit "K," p. 11), and the local District Attorney, George W. Hamilton. Of course, at that interview neither H. H. Katz nor Joseph B. Katz were present, and yet the Immigration authorities courageously and remorselessly violated all

the rules of evidence in permitting an affidavit to be used against the Katz brothers wherein Lucy F. S. Peers states a conversation that she had with George W. Hamilton, the District Attorney of Placer County.

Not only are neither H. H. Katz nor Joseph B. Katz bound by what she or her affidavit-making-friend, Jeannie K. Lobner, said, to George W. Hamilton, but such statements are the rankest kind of hearsay testimony and inadmissible in any court of justice.

Aside from that, it is but proper to state that George W. Hamilton, the former District Attorney of Placer County, directly contradicts the second affidavits of Lucy F. S. Peers and of Jeannie K. Lobner, in an affidavit presented by him in behalf of the Katz brothers dated August 29, 1914 (Exhibit "MMM," p. 93.)

This affidavit of George W. Hamilton, in our judgment, so completely demolishes the absurd prosecution, attempted to be built up against the Katz brothers by the Committee of Fifteen, assisted by the over-zealous Immigration Officials and their special counsel, Attorney Frank V. Cornish, that we quote and set the same out in full:

"In re 12020/659.} H. H. Katz and  
Katz Cases. } Joseph Katz.

State of California }  
County of Placer } ss.

"GEO. W. HAMILTON, being first duly sworn, deposes and says: I am a resident of the City of Auburn, of the above county and state; an attorney at law therein, and have lived therein for over forty years, and practiced my profession

therein for the past twenty-five years, and am now residing and practicing law at that place; that my attention and notice has just been called to two certain affidavits made by Lucy F. Peers and Jeannie K. Lobner, dated, respectfully, July 31st, 1914, and that I had not, previously, any notice or knowledge thereof, and that as to the statements therein contained, and the facts in relation thereto, deponent, respectfully shows, alleges and represents as follows, to-wit:

"That in the month of August, 1913, I was the duly acting and qualified district attorney of said county and state, and that about that time I was visited, and besought by the ladies in question, to take some official action toward and directed at the abatement and discontinuance of two houses of prostitution located in the City of Colfax, in said County and State.

"That the said ladies stated and represented themselves to be members of a local committee known as and designated as the 'Committee of Fifteen,' with the intention of, and the purpose, for its organization and existence, of abolishing the above places.

"That both of the above named persons, in that interview showed themselves to be entirely ignorant of the provisions and requirements of the law, and in addition, advised and informed affiant that they intended to have the redress above, regardless of either the inclination or the disposition of the district attorney, if he were not inclined to pursue the course and procedure which they had devised to be followed therein.

"That affiant did in that, and other conversations, with the said ladies named, and other of the committee, use every honorable and reasonable argument and persuasion against their following out their alleged purposes, and explained that they could not, and would not be of assistance therein.

"That affiant gave them all the information

which he had, and assured them that he was convinced of the character of the houses, but that he did not then, or at any other time, use the names of any persons, other than the persons actually conducting the said houses, to-wit, Nellie White and Roma Burdell.

"That affiant had not then, and had never had any information, notice or advice that either H. H. Katz or Joseph Katz, were either the owners, or had otherwise to do with either of the said houses.

That as such district attorney, and in pursuit of my official duties, I had investigated said places, and while convinced of the character, I had never been advised that either of the houses were either directly or indirectly, or in the remotest degree or manner, sustained or maintained by either of the Katz brothers.

That the agitations of the Committee of Fifteen, of which Lucy F. Peers was the secretary, and Jeannie K. Lobner, the president, finally led to the formal presentation of the subject to the city trustees of the City of Colfax, the board of supervisors of the county, and the grand jury, and that each of these bodies publicly and formally acted thereon, and refused to take any action in the premises, and that it was not then, or at any of the public presentations of the subject, pretended or represented that the houses in question were contributed to, in any way, except by the above named persons, Nellie White and Roma Burdell, and at no time, except when this alleged charge against the above named Katz brothers was prepared, framed and presented to the federal authority, was there any pretense thereof.

That with the utmost respect to the names and social standing of the ladies who have made and presented the above affidavits, that their actions and conduct had been repudiated and condemned by every public body in Placer County, and that the same is disclosed by the public record thereof.



That it has been their open and avowed boast that they would ruin those who did not share their views, or oppose their efforts, and that invariably, and without exception, every local body and commission, and persons conversant and advised of the situation, and of the motives of its advocates, has repudiated and condemned the movement and the methods of the committee.

"GEO. W. HAMILTON.

"Subscribed and sworn to before me this 29th day of Aug., 1914.

(Seal) MARY H. WALLACE, Notary Public."

This affidavit explains, much better than we can, the entire situation at Colfax and the reason for the hatred and deep-rooted prejudice of the good ladies of Colfax against the Katz brothers.

The next affidavit, the *third* affidavit of Minnie G. Williams (Exhibit "GGG", p. 79), is the most remarkable of all of the affidavits or documents and reports presented against the Katz brothers and upon which warrants of deportation were seriously asked for. A reading of this remarkable affidavit, sworn to on July 29, 1914, will disclose to this Honorable Court to what lengths persons will go who, although their intentions are well meant and to be commended, are ignorant of the rules of evidence and of the laws of the land, and who are willing, in their zeal and partisanship, to prostitute justice itself to accomplish their aim.

This remarkable affidavit of Minnie G. Williams contains a mass of rash and irresponsible statements, many of which are clearly hearsay, others based on information and belief, conclusions, opinions, and

anything and everything except legitimate and competent evidence. In fact, the affidavit seems to be rather an argument in which the affiant does not hesitate to heap tirades of abuse on the Katz brothers. Minnie G. Williams has much to learn about the rules of law. She makes the astounding and revolting statement in her affidavit of July 29, 1914, that: "INFORMATION AND BELIEF IS *ALL* THAT IS REQUIRED BY LAW."

Every other affiant, who seeks to deport the Katz brothers, seems likewise imbued with the idea that "information and belief is all that is required by law" to banish the Katz brothers. This view of the law seems to have been shared by the Immigration officials themselves, for they accepted these absurd and outrageous affidavits and acted upon them when ordering the deportation of the Katz brothers.

Not only does Minnie G. Williams, in this *third* affidavit, heap abuse upon the Katz brothers and indulge in such rash and irresponsible statements that the affidavit, so called, is not worthy of consideration at all as evidence against the Katz brothers, but she goes to the extent of upbraiding the inoffensive attorneys who happen to represent the Katz brothers and she says: "We pray that unscrupulous lawyers may not be permitted to juggle with the laws of the State and Nation—we pray that justice may be allowed to prevail." (Exhibit "GGG", p. 81.) Such irresponsible and ill-advised statements are the most convincing evidence of the unfairness of the hearings ac-

corded to the Katz brothers and of the fact that they were ordered deported, not on evidence, but on suspicion, conjectures, surmises, abuse, passion and prejudice. We cannot refrain from again quoting from the opinion of Judge Reed in *Hanges v. Whitfield*, *supra*, that the examination

“must be a lawful proceeding, the charge established by competent evidence, and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them. \* \* \* The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact. \* \* \* It is contended in behalf of the inspector that he is authorized under rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of immigration officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence, which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them.*”

District Judge Connor, in *Ex parte Lam Pui*, 217 Fed. 456, 465, after quoting from Judge Reed in *Hanges v. Whitfield* as above set forth, says:

“Long, and frequently sad, experience teaches that when officers entrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety, demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people’s representative in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors.”

The next affidavit is that of Jeannie K. Lobner, also her *third* affidavit to secure the deportation of the Katz brothers (Exhibit “FFF,” p. 78).

This affidavit is identical in language with that sworn to by Lucy F. Peers, also her *third* affidavit, to obtain the deportation of the Katz brothers (Exhibit “EEE,” p. 77). In fact, they are probably carbon copies of one and the same affidavit. Jeannie K. Lobner, like Lucy F. Peers, pretends to state an interview that occurred between herself and the other affidavit-maker, Lucy L. Peers, and the local District Attorney, George W. Hamilton. Obviously, such affidavit is the grossest kind of hearsay and not binding on either of the Katz brothers, neither one of them being present.



The next affidavit is still another affidavit, the *fourth*, by Minnie G. Williams (Exhibit "HHH," p. 82). It is dated August 1, 1914.

This affidavit is on a par with all of the other affidavits. It cannot be dignified by the name of evidence. It is based upon such absurd statements as: "It was commonly understood;" "according to general repute;" "it is understood;" "it has generally been accepted as a fact;" "no one was ever heard to deny."

Furthermore, the same objection as to deprivation of right of cross-examination and failure to give notice of the taking of the affidavit is urged as is contended with reference to the other affidavits.

The next curious document purports to be a petition of certain of the citizens of Colfax, dated July 29, 1914, addressed to the Secretary of Labor (Exhibit "III," p. 83). This petition contains the names of all of the persons who had given affidavits, some of them as many, as we have seen, as four affidavits, against the Katz brothers, and perhaps a few others. *It is not even sworn to.* It is the rankest kind of an information and belief paper, and would be inadmissible in any court of the land or in any other proceeding, administrative or otherwise, save possibly an immigration proceeding, where anything and everything seems to be admitted and accepted by some Immigration Officials in order to deport persons whom they deem undesirable aliens. The appeal to the Honorable Secretary of Labor is couched in such expressions as: "It has been a matter of com-

mon knowledge that they were profiting by the earnings of prostitutes;" and: "We, the undersigned, again *affirm our belief* of the guilt of Harry and Joseph Katz."

It must be evident that the use of such a petition must have inflamed the Immigration Officials at Angel Island and had a deep prejudicial effect upon the Secretary of Labor and deprived the appellant of that full and fair hearing which "the eternal principles of justice and right" accords him. (Language used in *U. S. v. Redfern*, 180 Fed. 500.) The appellant and his brother are pictured as monsters and fiends, and such appeal could not have any effect other than to deeply prejudice their cause before the administrative officers at Angel Island and Washington, resulting in their unlawful deportation.

The next remarkable document, used against the Katz brothers, is a letter and brief, dated August 18, 1914, on the part of Frank V. Cornish, City Attorney of Berkeley, and special counsel for the Committee of Fifteen (Exhibit "JJJ," p. 85).

This brief is addressed to the Honorable Secretary of Labor and is in the nature of an appeal to the Honorable Secretary of Labor to deport the Katz brothers. It contains a severe criticism of the showing made by the attorneys for the Katz brothers. It purports to state *as facts matters not proved at all, either directly or by any just or legitimate inferences*. It furthermore apparently contains suggestions to the Examining Inspector or to the Commissioner of Immigration—certain suggestions as to what should be

incorporated in the adverse recommendations of the Examining Inspector and of the Commissioner of Immigration such as: "Insert for emphasis just after remarks about representative men" (Exhibit "JJJ," p. 88.) "Put in something about the men making affidavits being interested in saloons, or the friends of saloon men" (Exhibit "JJJ," p. 88).

This letter and brief of Attorney Cornish indulges in other severe invectives against the Katz brothers, but the great difficulty about the brief and letter is that it has no facts to support the abuse heaped upon the Katz brothers. Aside from that, we respectfully submit that it was improper to admit such a brief and letter against the Katz brothers; that the pernicious activity of the special counsel for the Committee of Fifteen deeply prejudiced the cause of the Katz brothers in the minds of the Immigration Officials, and effectually deprived them of a fair and impartial hearing; that there is no authority in the Immigration laws or rules of procedure for the employment and appearance of special counsel to assist the Immigration Officials; that such a practice is evidence *per se* of unfairness and is most reprehensible. That the use of such brief constituted an unfair hearing under the law declared in *Ex parte Lam Fuk Tak*, 217 Fed. Rep. 468, 469.

Such documents, and such tactics, permitted by the Immigration Officials, to be used against the appellant and his brother, undoubtedly prevented them from having that full, fair and impartial hearing

which the laws of this country guarantee to the meanest and humblest person.

As was well said in *Ex parte Plastino*, 236 Fed. R. 2952, in a case involving deportation on the same charge of receiving, sharing in, or deriving benefit from the earnings of a prostitute, "Justice never hesitates in according a fair hearing; on the contrary, guarantees it to the worst criminal."

The next affidavit, and *the last*, is that of Edward H. Honn, made August 1, 1914 (Exhibit "KKK," p. 90). It is an exact duplicate of one of the many affidavits of Minnie G. Williams; perhaps a carbon copy; it is dated on the same day, to-wit, August 1, 1914. (Compare Exhibits "HHH" and "KKK," pp. 82-90.) It is subject to the same vices, such statements being permitted as "It was commonly understood;" "According to general repute;" "It is understood;" "No one was ever heard to deny."

We have thus, briefly, referred to every piece or particle of alleged evidence introduced against the appellant before the Immigration Officials and used by them as a basis for their warrant of deportation.

Without further elaborating upon the remarkable record presented, we respectfully submit that, as is so appositely stated by Judge O'Connor in *Ex parte Lam Pui, supra*, "mere suspicion, conjecture, speculation is not evidence."

On the part of the appellant, there was introduced before the Immigration Officials, as we have seen, the affidavit of George W. Hamilton, the local District Attorney, whose affidavit completely exonerates the



Katz brothers and explains the pernicious activities of the good ladies constituting the Committee of Fifteen at Colfax in endeavoring to rid that place of houses of ill-repute. Furthermore, there is the affidavit of George J. Meister, which refutes any suspicion that either of the Katz brothers had anything to do with the furnishing of the house operated by Nellie White. Besides that, are the affidavits of at least eight prominent citizens of Colfax, testifying to the character, good standing, industry and respectability of the appellant.

Having disposed of the proposition, that there is no evidence whatever worthy of the name to support the warrant of deportation, we also make the point that in the admission of the various affidavits, reports, documents, briefs, etc., the appellant was denied a fair and impartial hearing. That question has practically been considered and maintained in the previous pages of this Opening Brief. It is so interwoven with the absence of competent and legitimate evidence that to consider one is to consider the other.

We further invoke the doctrine enunciated in *Hanges v. Whitfield*, *supra*, and *Ex parte Lam Pui*, 217 Fed. Rep. 456, to the effect that the appellant was denied a full and fair hearing in failing to apprise him that he was entitled to the benefit of counsel at the *very outset* of the secret and preliminary hearing instead of at the *end* thereof, as disclosed by the record of the proceedings before the Immigration Officials.

As was said in *Ex parte Lam Pui*, 217 Fed. Rep., pp. 456, 465:

“Just why the inspector failed to inform petitioner, before subjecting him to the examination, of his right to have, and an opportunity to procure, counsel, is not easy to understand. Such conduct is so utterly at variance with the course pursued by all judicial officers, both State and Federal, that it arrests the attention and jars the conception of fair procedure.”

The same views were announced in *Ex Parte Plastico*, 236 Fed. R. 295, 297, as follows: “It was the right of the accused to be advised of the privilege of counsel *before* he was examined, and it is admitted that this information, if given, was not given until the examination was concluded.”

Another point made by us is, that the appellant was denied the right of cross-examination as to the four or five affiants who gave affidavits at Colfax subsequent to the time of the issuance of the warrant of arrest against the appellant. We refer to the affidavit of Robert A. Peers, given on August 10, 1914; of his wife, Lucy F. Peers, given on July 31, 1914; of Jeannie K. Lobner, given on the same day; of two affidavits given by Minnie G. Williams, one on July 29, 1914, and the other on August 1, 1914; and the affidavit of Edward H. Honn, given on August 1st, 1914.

While we have already indicated that these several affidavits and other documentary evidence in the shape of secret reports and investigations, and briefs and letters, were all unworthy of the name of evidence and

do not contain any real facts upon which to base a warrant of deportation against the appellant or, for that matter, against his brother Harry Katz (as was held by the learned Judge of the Court below), upon the charges made against each of the brothers, still, as a matter of precaution, and for the purpose of demonstrating the absurdity, unreliability and falsity of the matters set forth in these several affidavits above enumerated, counsel for appellant, before the Immigration Officials, endeavored to seek a cross-examination of the affiants. This request was denied. It is to be observed that no notice whatsoever was given to the detained or his attorneys that any affidavits would be taken in Colfax and no opportunity whatever was given to be present at Colfax, at the taking of the affidavits in order to cross-examine the affiants. We complained that the hearings were not full and fair in being denied the right of cross-examination, or given a reasonable notice and opportunity to be present at the taking of the affidavits, afterwards introduced and used against the appellant by the Immigration Officials.

We contend that the appellant was effectually deprived of the right of cross-examination. We demanded the production of the affiants as soon as we were apprised of the existence of the affidavits, for the purposes of cross-examination, but this important substantial right was denied.

This method of procedure on the part of the Immigration Officials deprived appellant of a fair and impartial trial, as is held in the cases of *Hanges v. Whit-*

*field*, 109 Fed. 675, and *Ex parte Lam Pui*, 217 Fed. 456. Record of Proceedings, Exhibits "WW" and "CCC," pp. 63-64, 73-74.)

It is true that, after Examining Inspector Griffiths at the hearings held on June 19, 1914, as to both Katz brothers, had denied the request for the production of the affiants for the purpose of cross-examination, the Commissioner of Immigration saw fit, after the practical submission of the two cases, to address a letter to Marshall B. Woodworth, one of the attorneys for the Katz brothers, in the following vein:

"Sir:

"Referring to the case of Dr. H. H. Katz, arrested under Department Warrant No. 53770/202, dated March 18, 1914, and Joseph Katz, arrested under Department Warrant No. 53770/1414, dated February 26, 1914, charging that these aliens have been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes, and in whose cases you demand that the witnesses be presented for the purpose of cross-examination by you, you are advised that there is no provision in the Immigration Law providing for the subpoenaing of witnesses. The case for the Government is submitted on affidavits aside from the direct testimony of the Katz brothers, and you as attorney for the defense have the privilege of submitting your case in a similar manner." (See Exhibit "SSS," p. 100.)

It is respectfully submitted that this letter of apology and explanation from the Commissioner of Immigration affords no defense or excuse for the failure of the Immigration Officers to give the ap-



pellant an opportunity to cross-examine these hostile witnesses. Whatever may be the condition of the law, which does not provide for the compulsory production of witnesses, still the Commissioner of Immigration, as a mere matter of *fairness* to the appellant, was in duty bound to notify him that the affidavits or the testimony of such and such witness was to be taken at Colfax or some other place at a certain and appointed time so that the appellant could have a legal representative there to cross-examine these witnesses, who were certainly hostile and prejudicial against appellant and his brother Harry Katz, as the record discloses.

In *Ex parte Ung King Seng*, 213 Fed. 119, it was held that a Chinese alien was not accorded a fair hearing before Immigration Officers, where her counsel was precluded by the Inspector from putting any questions on cross-examination to witnesses produced and examined against her.

Substantially the same injury is done to the Katz brothers by the Immigration Officers when they give no notice whatever that witnesses are to be examined against the appellant and thus preclude the attorney from being present to cross-examine. Especially is this true, where it appears that appellant on June 19, 1914, was led to believe that his case had been submitted and that there was no occasion for any further testimony against him.

Thereafter appellant was notified that additional affidavits had been secured against him and this necessitated a third and final hearing on September 2,

1914, at which additional affidavits and several documents and reports were introduced against him and his brother, without the slightest notice to them or to their attorneys of the fact that such affidavits would be taken and without the slightest opportunity to be present and cross-examine the affiants at Colfax or elsewhere.

At this final hearing on September 2, 1914, the attorney for the appellant and his brother again raised the point that the affidavits should not be admitted against the appellant and his brother because of the fact that they had been given no notice of the taking of the affidavits and no opportunity to cross-examine the affiants. This objection was overruled. What transpired may be best stated by quoting from the record of the proceedings at the final hearing held on September 2, 1914, at Angel Island, as follows:

"Attorney Woodworth: Yes sir. It is also in the nature of a brief. Now at this time, and in accordance with previous requests made by us which were denied, and for the purpose of protecting the rights of the Katz brothers should *habeas corpus* proceedings become necessary, we ask for the production of those people for the purpose of cross-examination.

"Inspector Ainsworth: I will say in reply to that, Mr. Woodworth, that this office has no means by which any of the witnesses may be produced here for your cross-examination, but this office has no objection to your going to those witnesses and obtaining any statements from them that they see proper to give you.

"Attorney Woodworth: As this is the final hearing of this matter, and we desire to have the cases closed and as we do not consider that the

affidavits contain any evidence worthy of the name—in other words, that the affidavits are based largely on hearsay, statements on information and belief, matters of opinion, and guess work on the part of the affiants, and as to repair to Colfax to cross-examine those witnesses at this late day would take much time and necessitate an expenditure of considerable money, we state that the offer now made and permission granted to cross-examine these witnesses is not of any practical value and we will submit the case on the evidence offered here, such as it is, claiming that it is not sufficient to show, in the first place, that Dr. H. H. Katz at any time was found connected with the management of a house of prostitution, or that he was found receiving, sharing in, or deriving benefit from the earnings of a single prostitute. We call the attention of the Honorable Examining Inspector and the Honorable Commissioner of Immigration to the fact that the matters with reference to Dr. H. H. Katz really relate to something that happened about five years ago, at any rate, previous to the amendment of 1910, amendment to the act of February 20, 1907. As to his brother, Joseph Katz, we admit that he owned the land and the house at the time the warrant of arrest was issued against him, but we contend that there is no evidence to show that he was found connected with the management of a house of prostitution or that he was found receiving, sharing in, or deriving benefit from the earnings of a single prostitute. It is true that he received \$25 a month, but that was simply for the rent of the place and his relation to the place was simply that of landlord and tenant. In support of these two defendants we present the following affidavits, which we ask to be appropriately marked. They consist of affidavits presented in duplicate, those affidavits to be used in both cases, of Geo. W. Hamilton, District Attorney for the County of Placer, in which Colfax is

situated, in which he completely demolished, in our judgment, any semblance of evidence that may have been presented against the Katz brothers." (Exhibit "CCC," p. 74.)

The imperative necessity for some sort of notice, to be given to the appellant, is obvious, especially if it be true that a compulsory production of the witnesses against an alien cannot be had by the Immigration Officers. Otherwise, what protection has an alien charged with deportation? The privilege of going perhaps a long ways to cross-examine a witness, and perhaps many days or months after he has given his direct examination, is no privilege at all and practically robs cross-examination of its principal virtue, viz.: that of an immediate examination of the adverse and hostile witness *at the time that he makes the adverse and inimical statements*.

We cannot conceive how, under any aspect of the case presented to this Court, it can be claimed by counsel for respondent that the appellant or his brother had a fair and full hearing in being denied the right of cross-examination of the various hostile and adverse witnesses produced against them, and without the slightest notice that their statements would be taken, a considerable portion of the statements being taken without any notice to appellant or his counsel *after* it was announced that the cases had been closed and finally submitted for decision.

*Hanges v. Whitfield*, 209 Fed. 675;  
*Ex parte Lam Pui*, 217 Fed. 456;  
*Ex parte Ung King Seng*, 213 Fed. 119.



Aside from these several palpable violations of what should constitute a full and fair hearing, it is well settled that the burden of proof is on the Immigration Officials.

*U. S. ex rel. Castro v. Williams*, 203 Fed. 155.

It is not sufficient to raise a doubt.

*U. S. v. Hom Lim*, 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence.

*Ex parte Yabucania*, 199 Fed. 865.

Immigration Officials cannot act arbitrarily in refusing to believe persons sought to be deported or their witnesses.

*U. S. v. Lee Chung*, 206 Fed. 367;  
*In re Jew Wing Toy*, 91 Fed. 240;  
*Wong Chung v. U. S.*, 170 Fed. 182, 95 C. C. A. 198;  
*U. S. v. Leung Sam et al.*, 114 Fed. 702.

"In determining whether aliens are entitled to admission, the Immigration authorities act in an administrative and not a judicial capacity, and *must follow definite standards and apply general rules.*"

*U. S. v. Uhl*, 203 Fed. 152.

"Congress has seen fit to vest the final decision as to the right of aliens to enter the country in the Department of Commerce and Labor, but that department is governed by certain rules and regulations which must be *strictly construed* in conformity with the *eternal principles of justice and right.*"

"It is fundamental in American jurisprudence

that every person is entitled to a fair trial by an impartial tribunal."

*U. S. v. Redfern*, 180 Fed. 500.

In the case of *U. S. v. Williams*, 185 Fed. 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings says:

*"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge. The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."*

The Immigration Officers must strictly follow the rules, which rules must not be inconsistent with established law.

*U. S. v. Williams*, 185 Fed. 598;

*Roux v. Commissioner of Immigration*, 203 Fed. 413;

*Hanges v. Whitfield*, 209 Fed. 675;

*Ex parte Lam Pui*, 217 Fed. 456;

*Ex parte Lam Fuk Tak*, 217 Fed. 468;  
*United States v. Lou Chu*, 214 Fed. 463.

In *Ex parte Lam Pui*, 217 Fed. 456, District Judge Connor said:

"Those decisions establish the principle, so just and consistent with conceptions of American jurisprudence, that, before an alien admitted to the United States as a member of the exempt class can be deported, it must be shown by evidence, not merely suspicious circumstances or conjecture, that he has obtained such admission by means of fraudulent representations. Any other rule would be violative of elementary conceptions of justice and fair dealing. In the light of the language used by the courts, the validity of the return to the writ must be examined, not for the purpose of weighing or estimating the value of the evidence, but of ascertaining whether, when tested by well-settled principles, the examination had by the inspector constituted evidence upon which the Secretary of Labor had jurisdiction to order the deportation."

\* \* \* \* \*

"Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved."

\* \* \* \* \*

"Inquisitorial methods of fixing guilt upon persons do not commend themselves to the minds of American lawyers or laymen. They are contrary to the genius of our institutions."

"In *Harlan v. McGourin*, *supra*, Mr. Justice Day, quoting the language used in *Hyde v. Shine*,

199 U. S. 84, 25 Sup. Ct. 764, 50 L. Ed. 90, 'In the federal courts \* \* \* it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his (petitioner's) discharge,' says:

"'In so stating, the learned justice \* \* \* was but affirming the rule well established under section 1014 that there must be some testimony before the Commissioner to support the accusation in order to lay the basis for an order of removal; otherwise, the accused could be discharged upon *habeas corpus*, although the court could not weigh the evidence when the record shows that some evidence was taken.'

"In *United States v. Williams*, 200 Fed. 538, 118 C. C. A. 632 (C. C. A., 2nd Circuit), Judge Noyes wrote the opinion for the court. Judges Coxe and Ward, thinking that their views upon this point were not expressed clearly, concurring, said:

"'The opinion does not, however, make entirely clear our views upon a single point. We think that some evidence must be presented to justify a judgment of deportation and that conclusions of law must have some facts upon which to rest. The immigrant may, in a sense, have a fair hearing, although the conclusions drawn by the executive officers be wholly unsupported by proof.'

"Text-writers and judges have undertaken to define the word 'evidence,' as applicable to judicial investigations, with more or less success. Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

"'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.' Draft, Code.

"It is elementary that in judicial proceedings



the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of courts. In *People v. Van Zile*, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

“ ‘Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.’ ”

“Judge Caldwell, in *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

“ ‘The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.’ ”

In the leading case of *Low Wah Suey v. Backus*, 225 U. S. 460, it is said:

“A series of decisions in this Court has settled that such hearings before executive officers *may* be conclusive *when fairly conducted*. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were *manifestly unfair*, that the action of the executive officers were such as *to prevent a fair investigation* or that there was a *manifest abuse of the discretion* committed to them by statute.” (Citing *United States v. Ju Toy*, 198 U. S. 253; *Chin Yow v. United States*, 208 U. S., p. 8; *Tan Tun v. Edsell*, 223 U. S. 673.) (Italics ours.)

In the case at bar, we contend that “the proceedings were *manifestly unfair*,” “that the action of the executive officers were such as *to prevent a fair investiga-*

tion;" and "that there was a *manifest abuse of discretion*."

But, aside from these questions of irregularities, divesting the proceedings before the Immigration Officials of that fairness required by the law of the land, the all important proposition for which we contend is that there is no sufficient or competent evidence whatever to support the warrant of deportation issued against appellant.

Mere suspicion or conjecture will not suffice, and the deportation of an alien upon suspicion or conjecture will justify a court in concluding that the order of deportation was arbitrary and unfair. These were the views announced in *Backus v. Owe Sam Gow*, 235 Fed. R. 849, by this Circuit Court of Appeals. At the risk of repetition, we again quote the language of that opinion, which we deem apposite to the case now presented for consideration to this Court:

"But mere suspicion or conjecture were not sufficient upon which to base a judgment \* \* \* In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial inquiry. (Citing *United States v. Ju Toy*, 198 U. S. 253, 260, 25 Sup. Ct. 644, 40 L. ed. 1140; *Chin Yow v. United States*, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. ed. 369; *In re Chan Kan*, 332 Fed. 855, 857—C. C. C.—and cases therein cited.)"

Therefore, if this Honorable Court should conclude, as we confidently believe it must, that there is no evidence to sustain the warrant of deportation, or that the appellant did not have that "full and fair

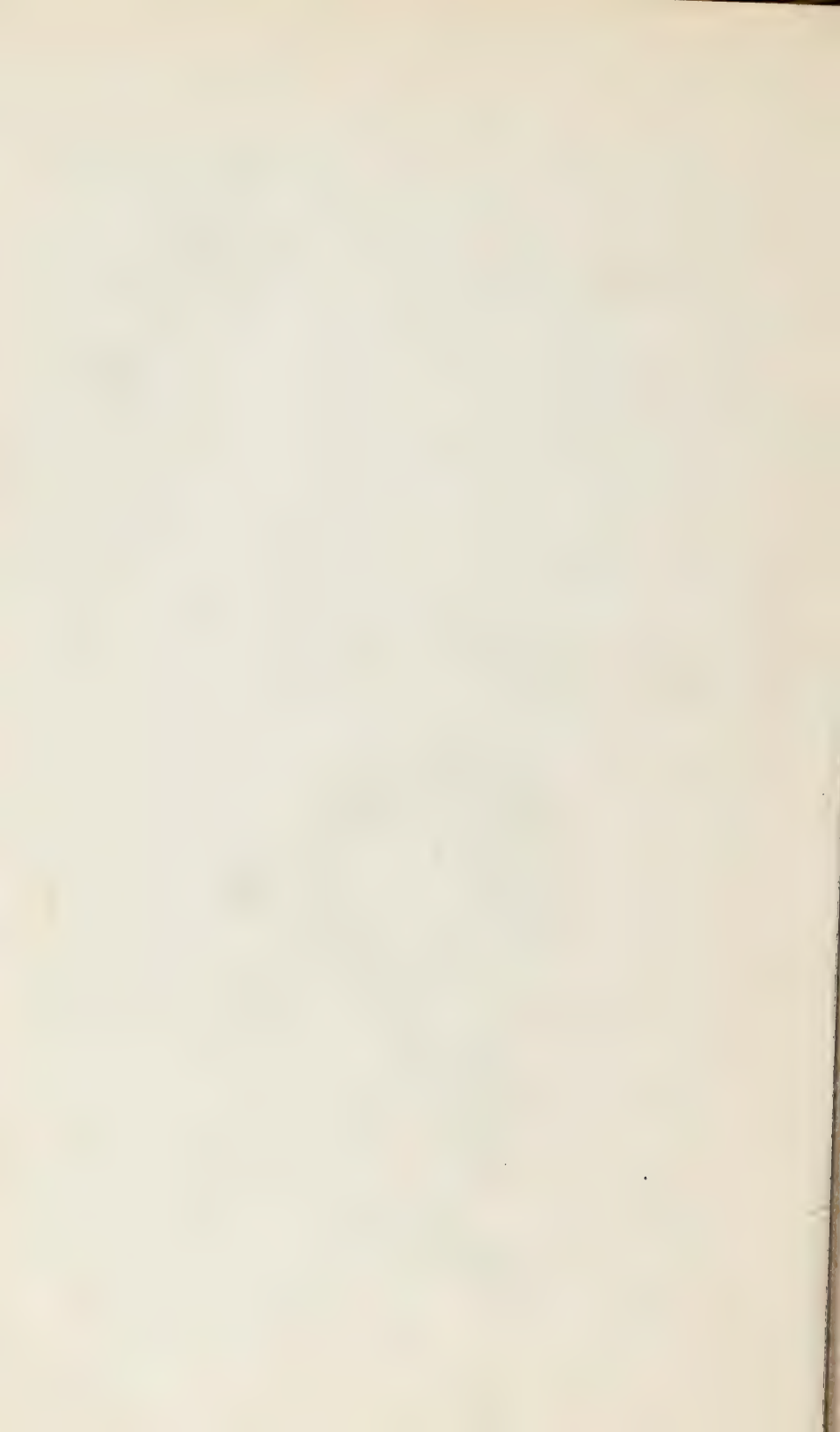
hearing" which the law and the rules and the decisions guarantee to an alien arrested on deportation charges, then the proceedings were "fatally irregular"; and the order of deportation based upon them was therefore *invalid*; and the present detention of appellant under such order and warrant of deportation *illegal*; and he is entitled to his absolute discharge as was held in the case of *United States v. Williams*, 185 Fed. Rep. 598, 604.

As to the further question of law, whether appellant, being merely a landlord—an alien landlord—of property used as a house of ill-fame, subjects him to the drastic penalties of the Immigration laws as one who receives, shares in, or derives benefits from the earnings of prostitutes simply because he received \$25 a month rent for the premises as landlord, BUT IN NO OTHER CAPACITY, we respectfully contend that such an interpretation was not intended by Congress and is violative of all the well settled rules of statutory construction, and that the decision of the Court below in that regard is incorrect and should be reversed, and the appellant discharged, upon the issuance of the writ of *habeas corpus* as prayed for in his petition.

Respectfully submitted,

MARSHALL B. WOODWORTH,  
Attorney for Appellant.

S. LUKE HOWE,  
*Of Counsel.*





No. 2812

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH B. KATZ,

*Appellant,*

VS.

COMMISSIONER OF IMMIGRA-  
TION at the Port of San Fran-  
cisco, California,

*Appellee.*

## GOVERNMENT'S BRIEF

Upon Appeal from the Southern Division of the United States  
District Court for the Northern District of California,  
First Division

JOHN W. PRESTON,  
United States Attorney,

CASPER A. ORNBAUN,  
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*Attorneys for Appellee.*

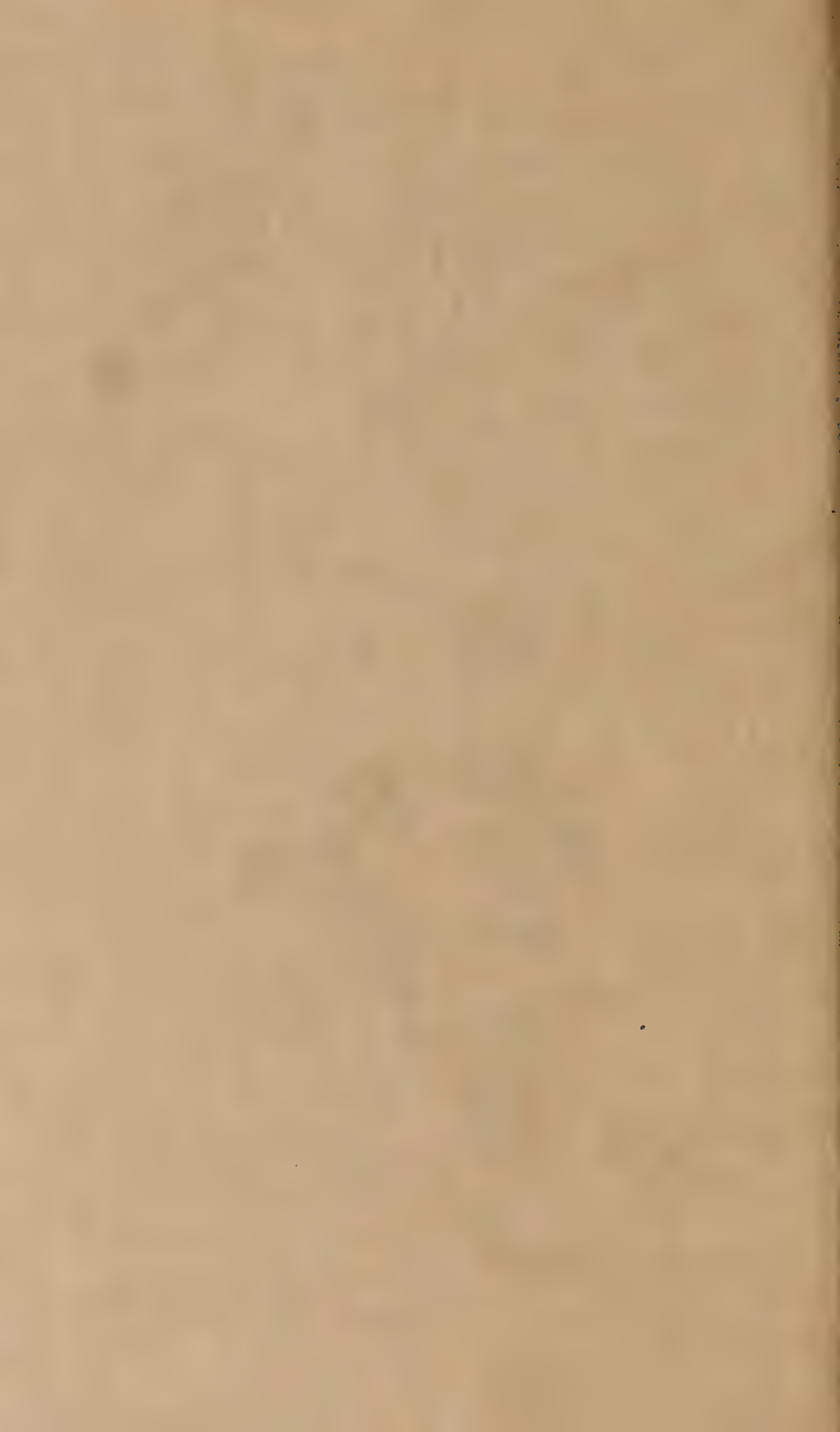
**Filed**

Filed this 7 - 1917 day of March, 1917.

F. D. Monckton,  
Clerk.

FRANK D. MONCKTON, Clerk,

By \_\_\_\_\_, Deputy Clerk.



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## GOVERNMENT'S BRIEF

### STATEMENT OF CASE.

The facts governing the deportation proceedings of Joseph Katz, the appellant in this case, are very similar to those set forth in the Government's brief covering the case of *Samuel W. Backus, et al.*, vs. *Harry Katz*, now on appeal in this Court, but while there is a similarity in the facts governing both cases, it is also true in this case that all of the evidence considered was not the same as the evidence reviewed in the case of Harry Katz, the brother to appellant.

Joseph Katz was born in Poland and left Liverpool, England, October 9, 1906, for New York City; from New York he came to San Francisco, arriving

about April 1907. About the year 1909 he went to Colfax and remained there until the time of his arrest in 1914. On February 26, 1914, a warrant was issued by the Secretary of Labor for the arrest of Joseph Katz, charging:

“That the said Joseph Katz is unlawfully within the United States in that he has been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes”.

When the appellant, Joseph Katz, was arrested on the said warrant, he petitioned for a writ of habeas corpus. All of the evidence and proceedings set forth in the original record which is marked Exhibit “A” and made a part of the appeal record in this case, was made a part of the petition in the lower court, and was considered by said court as a part of the petition for a writ of habeas corpus, upon the hearing of the Government’s demurrer. So the lower court took into consideration all of the pleadings, evidence and other documents now before this Court when it sustained the Government’s demurrer to said petition.

### ASSIGNMENTS OF ERROR.

Counsel for appellant, on page 27 of his brief, sets forth the following assignments of error, as follows:

“First: There is an absolute insufficiency of any alleged evidence, either in fact or in law, to support the warrant of deportation against Joseph B. Katz;



Second: That 'information and belief', hearsay, opinions, conclusions, surmises or conjectures, or anything not recognized by the established rules of law as competent and legitimate evidence, can not be made the basis of a warrant of deportation;

Third: Unfairness of hearing in many particulars."

### ARGUMENT.

The foregoing assignments bring the Government to a consideration of the same points that had to be considered in its brief in the appeal of appellant's brother, Harry Katz, namely: if the proceedings of the Immigration officials were not manifestly unfair or such as to prevent a fair investigation or amounted to a manifest abuse of discretion, they were not open to attack.

*Low Wah Suey vs. Backus*, 225 U. S. 460,  
*U. S. vs. Ju Toy*, 198 U. S. 253; 49 L. Ed.  
 1040,

*Chin You vs. U. S.*, 208 U. S. 852,  
*Tang Tun vs. Edsell*, 223 U. S. 673.

The findings of the Secretary of Labor are final and conclusive.

*Ekiu vs. U. S.*, 142 U. S. 651,  
*Lee Lung vs. Patterson*, 186 U. S. 170,  
*The Japanese Immigrant case* 189 U. S., page  
 86,  
*Tang Tun vs. Edsell*, 223 U. S. 673,

*Low Wah Suey vs. Backus*, 225 U. S. 460,  
*U. S. vs. Ju Toy*, 198 U. S. 253,  
*Zakonaite vs. Wolf*, 226 U. S. 272,  
*Chin You vs. U. S.* 208, U. S. 8,  
*Healy vs. Backus*, 221 Fed. 358.

In *Lee Lung vs. Patterson*, *supra*, the Court said:

“It was decided in *Nishimura Ekiu’s* case that Congress might intrust to an executive officer the final determination of the facts upon which an alien’s right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing vs. U. S.*, 158 U. S. 538, 39 L. Ed. 1082; 15 Sup. Ct. Rep. 967 and at the present term in *Fok Young Yo vs. U. S.*, 185 U. S. 306.”

In *Low Wah Suey vs. Backus*, the Court said:

“A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair; that the action of the executive officers was such as to prevent a fair investigation, or that there was a

manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final.

*U. S. vs. Ju Toy*, 198 U. S. 253,  
*Chin Yow vs. U. S.*, 208 U. S. 8,  
*Tang Tun vs. Edsell*, 223 U. S. 673."

A careful reading of the brief submitted on behalf of said appellant does not change the Government's opinion in that the matters to be considered in this appeal are practically the same as those considered in the Harry Katz case. It is conceded by appellant herein and by his counsel that he was the owner of the house in which Nellie White and other women dwelt; that he received rental from this building during the time that the said Nellie White and the other women occupied the same.

Counsel representing appellant indicates in his brief that the only question to be determined herein is whether or not a party owning a building and receiving the rental from a prostitute who occupies the same, subjects himself to deportation proceedings.

While this no doubt is one of the principal questions involved, yet the Government desires to call attention to the fact that there was much other evidence introduced in this case which was considered by the Secretary of Labor and the other Immigration officials when this case was before them and that all of this evidence was before the lower Court at the time

when it sustained the Government's demurrer to the petition for a writ of habeas corpus interposed on behalf of the appellant.

So we are again confronted with this question. Is there sufficient evidence in this case to justify the Secretary of Labor to order appellant deported?

In order to get clearly before the Court just what evidence was considered by the Secretary of Labor and also by the lower Court, the Government will now call attention to what it considers the most material evidence introduced, and will therefore now set forth only a portion of the affidavits and other matters which appear in the original record now on file and which were considered by the said Secretary of Labor and the said lower Court.

Attention is first directed to an affidavit made by Robert A. Peers, found on page 76 of the record of the Bureau of Immigration, which is marked "Exhibit A", and is on file and to be considered in this case. The affidavit is as follows:

"State of California }  
County of Placer } ss.

Robert A. Peers, of lawful age, being first duly sworn, deposes and says:

That he is now, and at all times herein mentioned has been a citizen of Colfax, Placer County, State of California, and has been a practicing physician therein; that he has been acquainted with Harry Katz, also known as Dr. H. H. Katz, the alien described under depart-



ment Warrant No. 5377L202, dated March 18, 1914, for a period of five years last past; that he knows the property described as lots 8 and 9 of Block E on Church St. and affiant avers that he was one of several citizens who petitioned the then District Attorney of Placer County, Charles Tuttle, to have the nuisance, consisting of a house of prostitution run by said Harry Katz on the lots 8 and 9, aforesaid, abated. The affiant also avers that said Harry Katz was arrested for conducting a house of prostitution at these premises during the year 1909. The affiant avers that it was a well-known fact that Harry Katz was arrested in the year 1909, because he was managing a house of prostitution and that he was brought before Justice of the Peace Kuenzley in an effort to close said house of prostitution. The affiant also avers that since that time the two brothers, Harry Katz and Joseph Katz, have conducted a house of prostitution on the property described as lot 1, Block 2, additional survey of the town of Colfax and it is a well-known fact in Colfax that the Katz Bros. were interested in the management of this house of prostitution, over which Nellie White, a notorious prostitute presided as madam. The affiant avers that he has never heard these things denied until the arrest of Joseph and Harry Katz in 1914. The affiant further avers that he has known Joseph Katz for a period of three years last past. The affiant further avers that he has frequently heard the property on lot 1, Block 2, aforesaid, described as the 'Katz house' and as 'Katz whore-house'. The affiant further avers that Harry Katz made frequent visits to

Colfax previous to his arrest and that it was generally understood by the people of Colfax that such visits were because of his interest in the management of the house of prostitution where Nellie White presided as madam.

(Sgd.) ROBERT A. PEERS, M. D.

Subscribed and sworn to before me this 10th day of August 1914.

(Sgd.) MORRIS LOBNER,  
Notary Public in and for the County  
of Placer, State of California."

On page 77 of said original record, there is also an affidavit of Lucy F. Peers, similar to that offered by the said Robert A. Peers. The affidavit reads as follows:

"State of California }  
County of Placer } ss.

Lucy F. Peers being duly sworn deposes and says: She is now and during all times herein mentioned was a resident of the City of Colfax, Placer County, State of California. That in August 1913 the affiant in company with Jeannie K. Lobner called upon Geo. H. Hamilton, then District Attorney of Placer County, and asked him to abolish the house of prostitution run by H. H. Katz and Joseph Katz, situated at the north entrance to Colfax.

That said District Attorney, Geo. W. Hamilton, replied that he knew the house mentioned, that H. H. Katz was a personal friend and client of his, that he (Hamilton) defended H. H. Katz

on a previous occasion in 1910 when accused of conducting a house of prostitution at the west entrance to Colfax, that he (Hamilton) knew more about this place than the complainants, that he (Hamilton) knew the character of this house at the north entrance to Colfax, that it was generally known that the Katz Brothers were associated with the house, and that any one who tried to deny it would be a fool, that he (Hamilton) had influence with H. H. Katz and that he could go up to Colfax that very afternoon and persuade H. H. Katz that he had conducted the place long enough, that it was now time to quit the business; that affiant and Jeannie K. Lobner then and there asked H. H. Katz's former attorney, Mr. Geo. W. Hamilton, then District Attorney of Placer County, to do as he said he had the power to do. Said Hamilton thereupon refused unless a warrant was sworn to and case brought to trial.

(Sgd.) LUCY F. PEERS

Subscribed and sworn to before me this 31st day of July, 1914.

MORRIS LOBNER,  
Notary Public for Placer County."

On page 78 of said original record there appears an affidavit of Jeannie K. Lobner as follows:

"State of California }  
County of Placer } ss.

Jeannie K. Lobner being duly sworn deposes and says: She is now and during all times herein mentioned was a resident of the City of Colfax, Placer County, California, that in August 1913

the affiant in company with Lucy F. Peers called upon Geo. W. Hamilton, then District Attorney of Placer County, and asked him to abolish the house of prostitution run by H. H. Katz, situated at the north entrance to Colfax.

The said District Attorney, Geo. W. Hamilton, replied that he knew the house mentioned, that H. H. Katz was a personal friend and client of his, that he (Hamilton) defended H. H. Katz on a previous occasion in 1910 when accused of conducting a house of prostitution at the west entrance to Colfax, that he (Hamilton) knew more about this place than the complainants, that he (Hamilton) knew the character of this house at the north entrance to Colfax, that it was generally known that the Katz Brothers were associated with the house, and that any one who tried to deny it was a fool, that he (Hamilton) had influence with H. H. Katz, that he could go up to Colfax that very afternoon and persuade H. H. Katz that he had conducted the house long enough, that it was now time to quit the business, that affiant and Lucy F. Peers then and there asked H. H. Katz's former attorney, Mr. Geo. W. Hamilton, then District Attorney of Placer County to do as he said he had the power to do. Said Hamilton thereupon refused unless a warrant was sworn to and the case brought to trial.

(Sgd.) JEANNIE K. LOBNER.

Subscribed and sworn to before me this 31st day of July, 1913.

MORRIS LOBNER,  
Notary Public in and for the  
Placer County, Calif."



Also affidavits of Minnie G. Williams beginning on pages 79 and 82 of said record, as follows:

“State of California, }  
County of Placer. } ss.

Minnie G. Williams, being duly sworn deposes and says: That she is a citizen and has been for the past twenty years a citizen of the City of Colfax, California. To the ridiculing of the counsel for the defense of the affidavits presented by members of the Committee of Fifteen and others, the affiant makes reply as follows:

The counsel for the defense avers again and again that the affidavits of a goodly number of respectable citizens should be given no credence, ‘in the face of the denial of Dr. Katz’. Each and every person making affidavit to the disreputable character of Dr. Katz, is a person of irreproachable character, a person of noted veracity. Is it reasonable to suppose that these people would be guilty of registering such appalling accusations against any individual unless they were driven to it by good and sufficient reasons? Any one of the accusers of Dr. Katz would lose a hand rather than besmirch the character of an innocent person. The affiant avers that the denials of a man of the character of Dr. Katz should be given no credence in the face of the sworn statements of so many upright citizens. Dr. Katz is a menace to our community, a menace to any community wherein he resides, and the removal of this menace is the only motive that has prompted the institution of proceedings against him. Dr. Katz

and his associates have had ample warning, have purposely been given ample time, in order that they might withdraw peaceably. Dr. Katz was not ignorant of the fact that he was conducting a business in direct violation of the laws of California, but he chose to defy the laws of California, and it is the business of the State to uphold its laws.

The women composing the organization known as the Committee of Fifteen are not suffragettes, are not militants, are not agitators. They are teachers, business women, home-loving women, women on whom rests no stain, women of modesty, refinement and culture. These women realize the danger threatening their homes, threatening all the Colfax homes, and it is this that prompted them to come out into the public glare and fight. Women that will not fight for their homes and loved ones are unworthy the name of women. When the laws of the State of California are so drastic against the crime of prostitution, the plaintiffs in this case can see no reason for permitting the debauchery of the young people of Colfax in order that the Katz Brothers may be enabled to pick up easy money by exploiting the shame of women.

The Counsel for the defense avers that the affidavits of the complainants should be given no credence as they are based on information and belief. Information and belief is all that is required by law. The people opposed to the crime of prostitution are in the habit of keeping as far away from brothels as possible and therefore could not testify to occurrences from

actual experience. The people that frequent brothels, and who could give damaging evidence if they would, will not do so. As no man would be forced to incriminate himself, and as the law recognizes the fact that it would be almost impossible to get actual evidence, it is very plainly stated in the law that common repute is all that is necessary for incriminating in this particular form of crime.

The men who have made affidavits to the good character of Harry Katz and Joe Katz are not men with high moral standards of morality. They are of the class that thinks the sowing of wild oats is a necessity, that manliness and libertinism are synonymous terms. The most of them are interested directly or indirectly in the liquor business. They would not be held up as examples for the sons of the complainants to emulate.

The affiant further deposes and says that every affidavit offered in the accusation of Katz Brothers is absolutely relevant, material and pertaining to the case. Considerable of the evidence in the affidavits was presented for the purpose of giving the lie to the testimony of the Katz Brothers, which it did. If the Katz Brothers would swear falsely to a part of the testimony there is no reason for believing any part of their testimony.

The Katz's stated they had no knowledge of the character of the inmates occupying their house at the west entrance to town. The affidavits of C. W. Hanson shows that Harry Katz was brought to trial because of his ownership

of this disorderly house, and because of the nuisance it was to the neighborhood. It is quite evident that there was no feeling of animosity or spite, when the complainants allowed the case to be dismissed upon Harry Katz promising to never again attempt to allow the house to be used for immoral purposes. All this can be further verified by the court records. All of which proves beyond question that the testimony of the Katz Brothers and the affidavits of D. A. Russell and P. W. Crider are absolutely false. The statement of Harry Katz, that he could not remove a fence because a carpenter had put it up is worthy of an imbecile. We expected the counsel for the defense would have sense enough to avoid calling attention to so silly a statement.

Harry Katz did not, as far as we know make any further attempt to conduct a brothel within his house at the west entrance to town, but he, as soon as possible, got possession of a house and lot at the north entrance to town, and proceeded to establish his prostitutes there and continue his nefarious business. That Harry Katz has not lived here continuously four years is irrelevant, immaterial and not pertaining to the case. He was interested enough here to leave his business in Stockton and come to Colfax several days each month as shown by the former affidavit. The affiant further states and wishes to emphasize that during the visits of Harry Katz to Colfax, that beyond any shadow of doubt, he resided with woman, Nellie White, whom he claims was merely a tenant, and of whose character he knew nothing. Harry Katz



testifies that he had nothing to do with the house at the north entrance to town. The affiant showed in her former affidavit that Harry Katz paid part of the bills, and that the bills paid by Joe Katz were first submitted to Harry Katz which shows conclusively that Harry Katz had a great deal to do with the aforesaid house, and reveals the falseness of the testimony of both Harry Katz and Joe Katz. The plaintiffs in this case, who represent and are acting for the moral element of Colfax appeal to the State of California, appeal to the Federal Government to be relieved of the presence of these arch fiends. We pray that unscrupulous lawyers may not be permitted to juggle with the laws of the State and Nation—we pray that justice may be allowed to prevail. In witness whereof the aforesaid affiant has hereunto set her hand and seal.

(Sgd.) MINNIE G. WILLIAMS,

Subscribed and sworn to before me this 29th day of July, 1914.

(Sgd.) MORRIS LOBNER,  
Notary Public."

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"State of California }  
County of Placer } ss.

Minnie G. Williams, being duly sworn deposes and says that she is now and for ever twenty years past has been a resident of Colfax, California, that she knows H. H. Katz, and knew him

when it was commonly understood that he conducted and managed a house of prostitution in said City of Colfax, in 1909, in Church street, that after the arrest of said H. H. Katz for his ownership of said brothel in 1909, he proceeded within a few weeks thereafter to get possession of a house and lot at the north entrance of said city of Colfax and proceeded to enlarge said house and equip it for prostitution and to establish therein the prostitute, Nellie White whom he formerly had within his house in aforesaid Church Street, and according to general repute continued, until his arrest in 1914, to conduct and manage said house of ill fame at the north entrance to said city of Colfax, that H. H. Katz came regularly and continually from Stockton or Sacramento to Colfax and remained in Colfax several days each month with head-quarters in aforesaid house of ill fame, that the prostitute Nellie White, was commonly described as "Nellie Katz" and as "the Katz woman".

The affiant further avers that it is understood, and, ever since the said H. H. Katz, established said house of prostitution at the north entrance of town it has generally been accepted as a fact by the people of Colfax that the Katz Brothers, H. H. Katz and Joseph Katz, conducted said house of prostitution at the north entrance to town, managing and directing the same, and that no one was ever heard to deny that they conducted and managed the said house of prostitution until they, the Katz Brothers were arrested in 1914.

(Sgd.) MINNIE G. WILLIAMS.

Subscribed and sworn to before me this first day of August, 1914.

MORRIS LOBNER,  
Notary Public in and for Placer  
County, California."

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I also wish to call attention to a report of the Committee of Citizens who investigated the matter concerning the Katz Brothers operating a house of prostitution in the City of Colfax, found on page 83 of said record, and which reads as follows:

"Colfax, California, July 26, 1914.

Hon. Secretary of Labor,  
Washington, D. C.

Sir:

We, the undersigned citizens of Colfax, wish to protest to you against the efforts made to prevent the deportation of Harry and Joseph Katz, charged with being undesirable aliens and keepers of a house of prostitution in Colfax. We make this protest not because of any feeling of ill-will or malice against these aliens individually, but because we feel that their influence and actions tend to lower the moral tone of the City and because of the baneful influence they have exerted and are exerting upon the youth of this City.

Affidavits have been prepared and furnished by friends of the defendants claiming that they, the defendants, are moral citizens and that they have never been connected with the business of prostitution in this City. We know that these affidavits do not contain the truth because for

years Harry and Joseph Katz have been owning a house of prostitution in this City and it has been a matter of common knowledge that they were profiting by the earnings of prostitutes.

The reason the deportation of these individuals was and is being sought is the fact that they have been ringleaders in the work of prostitution and that we felt the only way in which we could protect our growing youths was to abolish that trade. The appeal to local authorities was vain because of the activity of certain of the men who have signed affidavits in their behalf. Being men with some financial backing and political in standing and connected with the liquor traffic they could wield sufficient influence to prevent justice in the local courts. We felt that the Federal government being uninfluenced by local matters could by the deportation of Harry and Joseph Katz put the seal of official disapproval upon their nefarious traffic and protect the young of our City. That anyone could be found who would testify under oath that Harry and Joseph Katz were not guilty as charged was beyond our belief. Because such have testified we feel it our duty to urge you to listen to the testimony of fathers and mothers who are interested.

We, the undersigned, again affirm our belief in the guilt of Harry and Joseph Katz, and ask that our City be protected from them.

Respectfully submitted,

(Sgd.)

Robert A. Peers, Physician, father of two boys,



Lucy F. Peers, wife of Robert A. Peers,  
 Morris Lobner, Retired R. R. Agt., father of  
 2 daughters,  
 O. E. Williams, merchant, father of 2 daughters,  
 and 1 son,  
 Grant McMullen, merchant, father of 1  
 daughter and 1 son,  
 Geo. Elbert, merchant, father one son,  
 C. E. Schoonoover, telegrapher, 3 daughters,  
 1 son,  
 (Mrs.) Mamie L. Schoonoover, wife of C. E.  
 Schoonoover,  
 Mary Hanson, Housewife and schooltrustee,  
 J. Robinson (?) father of one son,  
 Wm. G. Carter, minister, father of four sons,  
 Esther V. Carter, mother of four sons,  
 Emma L. Williams, wife of O. E. Williams,  
 E. H. Honn, rural mail carrier, father of two  
 daughters and 1 son,  
 Rosa A. Honn, mother of two daughters and  
 1 son, wife of E. H. Honn, is a housewife,  
 W. B. Fowler, hotel keeper, father of one  
 son,  
 Harvey L. Wolfsen, rancher, father of two  
 daughters and 1 son,  
 Katie P. Wolfsen, mother of two daughters  
 and 1 son, wife of Harvey L. Wolfsen,  
 F. G. Irving, rancher, father of one daughter,  
 Mrs. Mary K. Irving, wife of F. G. Irving,  
 Minnie G. Williams, bookkeeper, wife of S.  
 K. Williams,  
 S. K. Williams, lumber merchant,  
 J. L. Rollins, M. D., father of 8 children,  
 Eliza Lang Perkins,  
 Jeannie K. Lobner, wife of Moris Lobner,

Frances E. West, wife of Geo. E. West,  
Sadie A. Robinson, mother of one boy.”

There are many other affidavits set forth in said Immigration record indicating that the house owned by the said Joseph Katz was well known as a house of prostitution and that the said Joseph Katz was the proprietor of the same. These affidavits are to a large extent based upon information and belief. However, some of them are of a positive nature.

The testimony of Joseph Katz, found on page 23 of said Immigration record, when considered in conjunction with his affidavit found on page 96 of said record, impresses one that he had little respect for the truth of the matters concerning which he was testifying. In his examination by the Immigration officials, beginning on page 23 of said record, he makes no effort to deny that Nellie White, one of the alleged prostitutes, was renting from him, but the lack of knowledge which he professes concerning the character of the business carried on by the said Nellie White and her associates in said building, indicates that he is concealing the truth concerning the matters about which he was being examined.

Counsel representing appellant lays considerable stress upon the case of *Whitfield vs. Hanges*, 222 Fed. 475 and *ex parte Lam Fuk Tak*, 217 Fed. Rep. 468, 469. The Government will concede that these cases, and especially the case of *Whitfield vs. Hanges* adopts an entirely different view from that established by

the Supreme Court decisions. There has been a tendency on the part of various Circuit Courts of Appeal not to give the Immigration officials the power which the Government contends is vested in them by the Immigration Act and also emphasized by the Supreme Court decisions. Keeping this point in view and with the idea of getting a ruling from this Court concerning the limitations of the Secretary of Labor and his subordinates, as to the character of evidence that should be considered in a deportation proceeding, the Government will now call attention to the cases upon which it relies in support of the action taken by the Secretary of Labor and his subordinates in the present case.

From the very nature of the investigation, the hearings of the executive officers must be of a summary character.

*Chin Yow vs. U. S.*, 208 U. S. 8,

*Sibray vs. U. S.*, 227 Fed. 1,

and their investigations are not subject to the formalities of procedure and rules governing the admissibility of evidence.

*Ex parte Garcia*, 205 Fed. 53,

*Fong Yue Tung vs. U. S.*, 149 U. S. 698,

*U. S. vs. Hong Chang*, 134 Fed. 19,

*Jew Yuen Case*, 188 Fed. 350,

*Choy Gum vs. Backus*, 223 Fed. 487,

*Siniscalchi vs. Thomas*, 195 Fed. 701,

*Jeung Bow vs. U. S.*, 228 Fed. 868.

The hearings may be conducted upon affidavits, ex parte depositions and interviews.

*Ekiu vs. U. S.*, 142 U. S. 651,

*Low Wah Suey vs. Backus*, 225 U. S. 460,

*Ex parte Garcia*, 205 Fed. 53,

*White vs. Gregory*, 213 Fed. 768,

*Jeung Bow vs. U. S.*, supra.

*Ex parte Chin Him*, 227 Fed. 131,

*Ex parte Wong Yee Toon*, 227 Fed. 247.

In *Ekiu vs. U. S.*, supra, Mr. Justice Gray said:

“An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful (cases cited) and Congress may, if it sees fit, as in the statutes in question, in *United States vs. Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But on the other hand, the final determination of those facts may be intrusted by Congress to executive officers, and in such case, as in all others, in which a statute gives discretionary power to an officer, to be exercised by him upon his own opinion of such facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by the law to do so, is at liberty to re-examine or controvert the suf-



ficiency of the evidence on which he acted. *Martin vs. Mott*, 25 U. S. Wheat. 19, 31 (6:537, 541); *Phil. & T. R. Co. vs. Stimpson*, 39 U. S. 14 Pet. 448, 458 (10: 535, 540); *Benson vs. McMahon*, 127 U. S., 457 (32: 234); *Oteiza y Cortes vs. Jacobus*, 136 U. S. 330 (34: 464)."

In *ex parte Wong Yee Toon*, supra, in discussing the power of courts to open up a case of Immigration officers, the court said:

"x x x The latter can interfere only when there is a total failure of all evidence upon which a fair-minded man would feel justified in acting. I certainly cannot find that there is any such lack here. If the question were one upon which it was my duty to pass, I am not prepared to say that I would not reach the same conclusion as that upon which the Secretary of Labor has acted."

In *ex parte Garcia* the alien was charged with violation of the Immigration Act in the same respect as appellee is charged in this case, and the Court, after giving the various questions which arose exhaustive consideration, said with respect to the use of affidavits, the following:

"Now, to the exact question, whether a trial by affidavits should be considered a 'fair hearing': If the answer be in the affirmative, the writ must be denied; for, as we have already seen, there is no evidence of bad faith, and admittedly, if *ex parte* affidavits may be con-

sidered, there was before the Secretary ample evidence to justify the issuance of the warrant. So far as I have been able to discover, the specific point is not ruled by any decision of controlling authority; but certain general principles applicable to such hearings have in varying language been repeatedly enunciated. It is well settled that trials of this character are not governed by the rules of criminal procedure. *Fong Yue Ting vs. United States*, 149 U. S. 698, 730. 13 Sup. Ct. 1016, 37 L. Ed. 905; *United States vs. Hung Chang*, 134 Fed. 19, 25, 67 C. C. A. 93."

In *Lee Lung vs. Patterson*, 186 U. S. 168, 176, 22 Sup. Ct. 795, 797 (46 L. Ed. 1108), the Supreme Court said:

'But jurisdiction is given to the Collector over the right of the alien to land, and necessarily jurisdiction is given to pass on the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper.' "

Counsel for appellant sets forth in his brief the affidavit of George W. Hamilton and seems to lay particular stress upon this affidavit in support of the

contention set forth in this brief, but in answer to this, the Government desires to call attention to the affidavit of Lucy F. Peers, found on page 77 of the original record of the Bureau of Immigration, and also the affidavit of Jeannie K. Lobner, found on page 78 of said record. These two affidavits will throw considerable light upon the interest which the said George W. Hamilton has shown in behalf of the Katz Brothers.

It will be noted that counsel for appellant has set forth on page 24 of the transcript the opinion and order over-ruling the demurrer in the Harry Katz case. That opinion and order has nothing whatever to do with this case and at the time that the lower Court rendered its opinion in the case under consideration, it did not only take into consideration the admitted fact that Joseph Katz was the owner of the building in which prostitution was being carried on and accepted the rental from said prostitutes, but also the various affidavits to which attention has been called in this brief. These indicate that the said Joseph Katz took a far more active part than a mere landlord would ordinarily take in the collection of his rentals.

The lower Court, in sustaining the Government's demurrer to the petition for a writ of habeas corpus in the present case, evidently considered that there was sufficient evidence to justify the execution of the order of deportation of the Secretary of Labor, and the Government now takes the position that under the

Immigration Act in question and the decisions handed down, not only by many of the United States Circuit Courts of Appeal, but also by the Supreme Court, that there was ample justification for the lower Court's opinion and order.

Respectfully submitted,

JOHN W. PRESTON,  
United States Attorney,

CASPER A. ORNBAUN,  
Asst. U. S. Attorney.  
*Attorneys for Appellee.*











